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Before the
Federal Communications Commission
Washington, D.C. 20554

(CORRECTED)

CC Docket No. 86-165

In the Matter of

Amendment of Section 22.901(c)(3)
of the Commission's Rules to
Simplify the Separate Subsidiary
Reporting Requirement in the
Domestic Public Cellular Radio
Telecommunication Service

REPORT AND ORDER

Adopted September 16, 1986; Released October 10, 1986

By the Commission:

Background

1. On April 18, 1986 the Commission adopted a *Notice of Proposed Rulemaking* (NPRM), 51 Fed. Reg. 17366 (1986), proposing that Section 22.901(c)(3) of the Commission's rules be amended to simplify the separate subsidiary reporting requirement in the Domestic Public Cellular Radio Telecommunications Service. Specifically, the Commission proposed to require the filing of only those agreements between the separate subsidiary and the parent Bell company or affiliate that relate directly to interconnection with landline exchange and transmission facilities.[1] The Commission tentatively concluded that such an amendment is needed to eliminate unnecessary filings and the resulting demands on space and other Commission resources.

Discussion

2. Ameritech Mobile Communications, Inc., BellSouth Corporation, BellSouth Mobility, Inc., NewVector Communications, Inc., and Southwestern Bell Corporation submitted comments in support of the proposed amendment arguing that the current requirements are overly burdensome and unnecessary. They maintain that the separate subsidiary requirement along with the increasingly competitive marketplace preclude anticompetitive behavior. The BellSouth companies go so far as to argue that no reporting requirement of any kind should be retained by the Commission. In contrast, the Cellular and Radio Common Carrier Divisions of Telocator Network of America (Telocator) argue against the proposed amendment. They maintain that the current filing requirements under Section 22.901(c)(3) are critical to the detection of anticompetitive practices. They also argue that the mere existence of the rule in its current form provides an incentive for the BOC's to avoid anticompetitive practices in inter-affiliate arrangements. Finally, they argue that if the Commission adopts the proposed change it should require the BOC's and their affiliates to file notifications with the Commission, identifying the parties to and subject matter of all inter-affiliate agreements that are not required to be filed and to maintain local public files of such contracts. Lin Cellular Communications Corp. supports the Telocator comments.

3. After carefully reviewing the comments we remain convinced that Section 22.901(c)(3) of the Commission's rules should be amended. We are not convinced that any purpose would be served by requiring the filing of notifications as Telocator requests. Moreover, with the exception of agreements concerning interconnection with landline networks, little scrutiny has been given to date, to the voluminous filings currently required. We are confident that our continued scrutiny of interconnection agreements and other requirements will enable us to detect any anticompetitive practices that may arise. Consequently, the need for the rule in its current form has been obviated. We will, however, continue to require that each separate cellular subsidiary keep copies of all agreements, of any kind, between itself and the Bell companies available for Commission inspection.

4. Accordingly, we will amend Section 22.901 to require the filing with the Commission of only those agreements between the separate subsidiary and the parent Bell company or affiliate that relate specifically to interconnection with landline exchange and transmission facilities. It should be noted that we will continue to require all transactions between the separate subsidiaries and related Bell companies to be reduced to writing. These changes will permit better use of staff resources and eliminate unnecessary filing requirements.

5. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden which the Commission imposes on the public. This proposed reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

6. Accordingly, IT IS ORDERED, that pursuant to the authority found in Sections 1, 4(i) and 303(c) of the Communications Act of 1934, as amended, Part 22 of the Commission's Rules and Regulations is amended as specified in Appendix A. These amendments shall become effective December 8, 1986.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

47 CFR Part 22 is amended as follows:

Part 22 - Public Mobile Radio Services

1. The authority citation for Part 22 continues to read as follows:

Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.901 is amended by revising paragraph (c)(3) to read as follows:

Section 22.901 *Eligibility*

* * * * *

(c) * * *

(3) All transactions between the separate corporation and the carrier or its affiliates which involve the transfer, either direct or by accounting or other record entries, of money, personnel, resources, other assets or any thing of value, shall be reduced to writing. A copy of any contract, agreement or other arrangement entered into between such entities with regard to interconnection with landline network exchange and transmission facilities shall be filed with the Commission within thirty days after the contract, agreement or other arrangement is made. A copy of all other contracts, agreements or arrangements between such entities shall be kept available by the separate corporation for inspection upon reasonable request by the Commission. The provision shall not apply to any transaction governed by the provision of an effective state or federal tariff.

* * * * *

FOOTNOTES

[1] Section 22.901(c)(3) reads, in relevant part: All transactions between the separate corporation and the carrier or its affiliates [the Bell companies] which involve the transfer, either direct or by accounting or other record entries, of money, personnel, resources, other assets or any thing of value, shall be reduced to writing. A copy of any contract, agreement or other arrangement entered into between such entities shall be filed within 30 days after the contract, agreement, or other arrangement is made.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

PUBLIC NOTICE

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

MOBILE SERVICES DIVISION RELEASES GUIDANCE REGARDING QUESTIONS OF REAL PARTY IN INTEREST AND TRANSFERS OF CONTROL FOR CELLULAR APPLICATIONS IN MARKETS BEYOND TOP 120

Report No. CL-87-1 October 2, 1986

In the course of reviewing applications submitted by tentative selectees for cellular licenses in Markets 121 and beyond, recurring questions have arisen concerning the issues of real party in interest and unauthorized transfers of control.

These questions have arisen as a result of arrangements by some of the tentative selectees to obtain services from another company to finance, design, construct, operate and manage the proposed cellular system. In some circumstances such company has the option to purchase controlling interest of the tentative selectee within a set period of time. In other situations the financing is contingent upon the financing entity being allowed to provide all or many of the above components.

The tentative selectees that present these proposals for the most part indicated that any term found not to be in compliance with the Commission's rules will be deleted or modified accordingly.

We are concerned that by entering into one of these arrangements a tentative selectee may have divested itself of substantial responsibility and control of its proposed facility in violation of Section 310 of the Communications Act of 1934, as amended. We had indicated in *Guidelines for Settlements and Changes in Ownership of Cellular Systems*, Public Notice of March 24, 1986, 2, n.1 , that:

> Ownership changes involving a party who was not an applicant in the market involved, or who did not acquire its ownership share through an eligible trade, must be evaluated on a case-by-case basis to determine whether a substantial change of ownership has taken place, under the body of case law governing changes in ownership and control Other factors, such as relative interests of other parties, practical day-to-day control, and the relationships of the parties to each other and to the company's business must be considered.

To facilitate our processing of applications and to guide future applicants, we are issuing the following guidelines.

A Commission licensee must at all times have control of and responsibility for its facility. To determine who has control of a proposed facility the Commission will examine the following factual questions:

1. Does the licensee have unfettered use of all facilities and equipment?
2. Who controls daily operations?
3. Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
4. Who is in charge of employment, supervision and dismissal of personnel?
5. Who is in charge of the payment of financing obligations, including expenses arising out of operating? and
6. Who receives monies and profits derived from the operation of the facilities?

See, Intermountain Microwave, 94 Rad. Reg. (P&F) 983, 984 (1963).

Where the answers to these questions are such as to indicate that the tentative selectee has given up control of the facilities, its application may be rejected on real party in interest or unauthorized transfer of control grounds. However, since it appears that applicants may have been uncertain as to what the standards concerning these arrangements are, and since we have not previously delineated what provisions would be acceptable, we will permit all tentative selectees in Markets 121 and beyond to file amendments to assure that the arrangement that they propose fully complies with Section 310 of the Act, as well as Commission policy. Amendments may include modification of one or more of the elements of the proposed arrangement; however, in no event would the tentative selectee be permitted to provide a new source of financing. Amendments shall be filed within thirty (30) days of this Public Notice.

For further information please contact Gerald M. Goldstein at (202) 632-6444.

FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

PUBLIC NOTICE

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

Extension of Time to File Opposition to Suggested Modifications To Rural Service Area Boundaries in CC Docket No. 85-388 Denied

Report No. CL-86-296 **October 1, 1986**

In the *First Report and Order*, CC Docket No. 85-388, FCC 86-302, Amendment of the Commission's Rules for Rural Cellular Service, released July 18, 1986, 51 FR 26895, July 28, 1986, the Commission adopted a 30 day filing period from the date the summary of that Order was published in the *Federal Register* for modifications of the proposed rural service area boundaries. Responses or oppositions to the modifications were be filed within 15 days.

Subsequently, in an *Order*, CC Docket No. 85-388, Mimeo No. 6533, released August 25, 1986, we allotted 45 days for the filing of oppositions to the boundary modification proposals and extended the time for filing oppositions to 20 days.

On September 24, 1986, Lukas, McGowan, Nace & Gutierrez, Chartered (LMNG) filed a motion for extension of time on behalf of 39 clients to file their oppositions on or before October 17, 1986. The basis for the extension request is that over 100 requests for modification have been filed and it took LMNG some 10 days to obtain copies of these requests. In addition LMNG stated that these requests involved numerous Rural Service Areas (RSAs), which necessitates it spending additional time to review and file oppositions thereto.

We have already granted an overall extension of time in this proceeding. In our *Order* of August 25, 1986, we determined that the public interest warranted granting a short increase in the filing periods in this proceeding. We rejected longer filing periods, such as the one proposed by LMNG, based upon the Commission's commitment to expeditiously provide rural cellular service to the public. In balancing the concerns expressed by LMNG with our overall goal in this proceeding, we conclude that it would not be in the public interest to grant the request for extension of time. Therefore the request for extension of time by LMNG is denied.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

General Docket No. 83-26

In the Matter of

Creation of an Additional	RM-4121
Private Radio Service	RM-4782

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1986 Released: October 1, 1986

By the Commission:

Background

1. On December 28, 1984, the Commission released a *Report and Order* which declined to allocate spectrum from the 900 MHz reserve[1] for a new private radio communication service (PRCS).[2] This service had been proposed to accommodate primarily personal communications of the general public, including mobile to mobile radio service and interconnected mobile telephone service. The Commission also had for consideration other requests for allocations from the 41 megahertz of reserve spectrum available in the 900 MHz band. Implementation of the PRCS proposal as well as the other uses under consideration would have required a total of over 80 megahertz of spectrum. After evaluating the record in this and other related proceedings addressing the 900 MHz reserve spectrum, the Commission concluded that in apportioning the available spectrum, other mobile services must all be afforded a higher priority than PRCS. In light of these priorities, and since insufficient spectrum existed to accommodate all of the pending requests, the Commission declined to allocate spectrum from the 900 MHz reserve for PRCS. In its *Report and Order*, the Commission also declined to initiate a proceeding for another personal radio service which had been proposed by the MURA Corporation.[3]

2. The Commission received two petitions for reconsideration of its decision, one filed by Mr. Ray Newhall (Newhall) and the other by the Personal Radio Steering Group, Inc. (PRSG).[4] PRSG requested that the Commission's action in the *Report and Order* be set aside and that a Further Notice of Proposed Rule Making proposing a new service to accommodate personal communications be adopted. Both petitions raised essentially three general arguments against the decision made in the *Report and Order*.

3. First, the petitioners stated that no single existing radio service meets all the communications needs of the American public which the proposed private radio communication service could have met. In support of its position, PRSG stated that the restricted eligibility of the private land mobile services makes them inappropriate for personal use. PRSG also claimed that the cellular radio service is too inflexible and costly and that the general mobile radio service (GMRS) is hindered by antiquated rules. Regarding the availability of alternative services, PRSG claimed that the cellular radio service can never be offered at cost levels projected for PRCS. The petitioners also disagreed with the Commission's determination that PRCS would be in the nature of a luxury or convenience. PRSG claimed that personal radio is no more in the nature of a luxury or convenience than traditional land mobile radio services, with the exception of public safety operations. Newhall asserted that the PRCS proposal represented the first time the Commission had addressed the true needs of the American public.

4. Second, the petitioners stated that the Commission's decision to decline an allocation for PRCS was based on flawed reasoning regarding the spectrum needs of existing land mobile services. Both petitioners claimed that these needs could be satisfied without additional spectrum if the Commission would require more efficient technologies. PRSG claimed that the problem in the land mobile services is not a shortage of spectrum, but merely wasteful use of spectrum. PRSG cited a separate petition it filed with the Commission requesting that narrower band technologies eventually be mandated for all land mobile operations.[5] PRSG claimed that had the Commission considered this petition in the context of the various requests for the 900 MHz reserve, it would have concluded that sufficient spectrum was available to meet all of the communications demands. Newhall stated that the Commission has been derelict in its duty to encourage more efficient use of the existing frequency spectrum. He further asserted that the Commission should have postponed decisions on the 900 MHz reserve requests until comments on PRSG's petition proposing narrower band technologies had been reviewed. PRSG also claimed that the Commission's decision to relax permissible communications restrictions for some private land mobile operations was relevant to this proceeding.[6] PRSG asserted that the issues raised in the permissible communications proceeding would have been more appropriately considered in this docket.

5. Third, both petitioners claimed that the *Report and Order* does not indicate a thorough reading of the public record. They asserted that the Commission ignored comments filed by the general public, and relied solely on the comments submitted by business representatives. The petitioners cited the partial list of commenters included as Appendix A in the *Report and Order*, and the statement that "approximately 100 parties submitted comments in response to the *Notice*."[7] The petitioners stated that there were more than 400 comments, reply comments, and *ex parte* submissions filed in response to the *Notice* and MURA's related petition.

Comments Responding to the Petitions

6. Several parties filed comments in response to the petitions for reconsideration. Mr. Edward W. N. Smith supported the petitioners' claims that no alternative offerings exist which could provide the service that PRCS had been designed to render. Mr. Smith also reiterated the petitioners' arguments that the Commission failed to recognize comments submitted by the public. He concurred with PRSG that a Further Notice of Proposed Rule Making should be initiated.

7. The Land Mobile Communications Council (LMCC), the Association of Maximum Service Telecasters (MST), the Cellular Telecommunications Division of Telocator Network of America (Telocator), and the Mobile Satellite Corporation (MOBILESAT) all filed oppositions to the petitions for reconsideration. These parties stated that the

Commission's decision was appropriate based on the information before it and that the petitioners had presented no new information not previously presented. MOBILESAT stated that the Commission's decision rests on substantial evidence in the record and that the assertions and arguments made by the petitioners do not factually or legally justify revisiting the decision.

8. Both PRSG and Newhall were joined by Mr. Thomas C. Bowling, III, Mr. Edward W. N. Smith, and Dr. Michael C. Trahos in submitting replies to those parties who opposed the petitions for reconsideration. These replies essentially reiterated the arguments which had been set forth in PRSG's and Newhall's petitions for reconsideration.

DISCUSSION AND DECISION

9. Given the foregoing background, we now consider the issues raised and the relief requested in the petitions for reconsideration. Our standards and requirements for petitions for reconsideration are well established by rule and case law. Most relevant here, petitions for reconsideration are not granted for the purpose of altering our findings on the basis of matters that have already been fully considered and substantively settled.[8] Similarly, parties that wish to reopen debate based on new facts can do so only under limited circumstances. Reconsideration based on new facts is appropriate only when these facts relate to events subsequent to the last opportunity for submission or which were then unknown and could not have been known by the petitioner at the time of the last opportunity, or when the Commission determines that subsequent consideration is required to protect the public interest.

10. In essence, the petitioners simply restated the reasons why they perceived a need for PRCS. These reasons had been stated previously by these petitioners and other supporters of the proposal. That petitioners disagree with our decision regarding the priority of various existing and proposed services is quite clear. However, bare disagreement, absent new facts and arguments properly submitted, is insufficient grounds for granting reconsideration.

11. Further, we disagree with the petitioners' claims regarding the spectrum efficiency issue. First, as LMCC pointed out, it is apparent that we did in fact consider the potential of more spectrum efficient technologies in taking action on the 900 MHz spectrum requests. The *Notices* which proposed spectrum releases for the private land mobile, cellular, and mobile satellite services all addressed the implementation of more spectrum efficient technologies.[9] We did address the generic issue of utilizing more efficient technologies for these services. Therefore, it was not necessary to focus on the specifics of PRSG's master plan prior to taking action on the various requests for reserve spectrum. Furthermore, in a separate action we decided that implementation of PRSG's master plan would not be in the public interest.[10] The plan was too broad in scope and did not provide appropriate consideration for the many different bands, services, or geographic locations involved nor for the different levels of technology that exist or that will be developed. Accordingly, we find no basis for the petitioners' claims that the Commission's decision to decline an allocation for PRCS was based on flawed reasoning regarding the spectrum needs of existing land mobile services.

12. With regard to the Commission's consideration of all comments, we agree that the number of commenters was understated. However, there is no evidence to suggest that public support for the new radio service, as displayed in the record in this proceeding, was unrecognized. The *Report and Order* specifically discussed comments submitted by individuals, associations, and representatives of small businesses and citizen assistance organizations in support of PRCS.[11] Concerning the list of commenters contained in Appendix A, the *Report and Order* clearly stated that this was a *partial* list. Therefore, it was not intended to be all inclusive. Furthermore, while the list did not include individuals per se, numerous commenters who supported PRCS were identified in the discussion. The comments of these parties were representative of those individuals who supported PRCS. We note, also, that individual private land mobile radio users who opposed the allocation to PRCS were not included on the list either. Since the item did recognize comments supportive of PRCS and since the views expressed in these comments were considered fully, we conclude that our decision was based adequately on the full record before us.

13. In view of the above, we conclude that the subject petitions have not met the criteria for favorable reconsideration in paragraph 9 of this *Order*. We agree with those commenters who stated that the petitioners have not presented any information which the Commission did not consider in its original decision. Also, the petitioners have failed to demonstrate that our original decision was based on flawed reasoning, or an incomplete review of the record. Accordingly, we reaffirm our earlier decision declining a specific allocation of the 900 MHz reserve for PRCS. However, we note that an allocation from the reserve was recently made for a general purpose mobile radio service.[12] Under that allocation, a licensee could choose to offer consumer-oriented communications services if the demand warrants.

14. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by The Personal Radio Steering Group and by Ray Newhall are DENIED, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, and 47 C.F.R. of the Commission's rules. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] For simplicity we will refer to the 41 megahertz of spectrum in the bands 821-825 MHz, 845-851 MHz, 866-870 MHz, 890-902 MHz, and 932-947 MHz collectively as the 900 MHz reserve.

[2] *Report and Order*, Gen. Docket 83-26, released December 28, 1984, 50 Fed. Reg. 865 (January 7, 1985).

[3] Petition for Rule Making, RM-4782, submitted February 10, 1984.

[4] Mr. Newhall's petition was filed January 30, 1985 and PRSG's petition was filed February 6, 1985. Notification of both petitions for reconsideration appeared at 50 Fed. Reg. 10856 (March 18, 1985).

[5] Petition for Rule Making, RM-4871, filed October 24, 1984.

[6] *Report and Order*, PR Docket 84-109, released January 31, 1985, 50 Fed. Reg. 6179 (February 14, 1985).

[7] *Report and Order*, Gen. Docket No. 83-26, *supra*, at para. 1.

[8] *See, e.g., WWIZ, Inc.*, 37 F.C.C. 685, 686 (1964), *aff'd sub-nom., Lorain Journal Co. v. FCC , 351 F.2d 824 (D.C. Cir. 1965), cert. denied*, 383 U.S. 967 (1966); *Florida Gulfcoast Broadcasters, Inc.*, 37 F.C.C. 833 (1964).

[9] *Notice of Proposed Rule Making*, Gen. Docket No. 84-1231, 50 Fed. Reg. 3809 (January 28, 1985) at paras. 21-23; *Notice of Proposed Rule Making*, Docket No. 84-1233, 50 Fed. Reg. 1582 (January 11, 1985) at paras. 17-19; *Notice of Proposed Rule Making*, Docket No. 84-1234, 50 Fed. Reg. 8149 (February 28, 1985) at paras. 39-45.

[10] *Memorandum Opinion and Order*, RM-4871, released April 19, 1985.

[11] *Report and Order*, Gen. Docket No. 83-26, *supra*, paras. 4-11.

[12] *Report and Order*, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, adopted July 24, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

(CORRECTED)

CC Docket No. 85-166
In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: September 17, 1986 ; Released: October 6, 1986

By the Commission:

I. INTRODUCTION

1. The National Association of Broadcasters (NAB) has filed an Application for Review and Petition for Interim Relief seeking to set aside the Common Carrier Bureau's exclusion of NAB's comments from CC Docket No. 85-166, Phase I. For reasons set forth below, we deny the application and request for interim relief.

2. In an Order released May 24, 1985,[1] the Common Carrier Bureau initiated CC Docket No. 85-166 to investigate the special access tariffs of local exchange carriers (LECs). The docket was created pursuant to Commission direction in CC Docket No. 83-1145, the underlying investigation of access and divestiture related tariffs.[2] The *Designation Order* created two phases of the investigation and specified the issues to be addressed in each phase. On July 24, 1985, NAB filed comments purporting to address the issues specified for Phase I. On August 14, 1985, the Bureau released an Order excluding NAB's comments on the ground that those comments addressed issues designated for Phase II.[3] NAB was permitted to withdraw its comments or have them considered in Phase II of the investigation.[4]

II. BACKGROUND

3. In the *Designation Order*, the Bureau specifically designated the issues to be investigated in Docket No. 85-166 and bifurcated the Bureau's consideration of the issues for purposes of scheduling written submissions. The Bureau directed the parties and commenters to organize their discussion according to an outline of designated issues, referencing the issues and sub-issues by letter and number. The issues to be discussed were categorized as rate structure issues (Phase I), and cost support and rate level issues (Phase II). The *Designation Order* directed interested persons and the LECs first to file comments addressing Phase I, the rate structure issues. Our consideration of Phase II, the cost support and rate level issues, was deferred until sufficient time had passed to permit acquisition of actual operating results.

4. On July 24, 1985, NAB filed comments in which it addressed the impact of the special access rate increases on private line audio services. NAB specifically asserted that the April 1, 1985 rate increases to many radio broadcasters were unreasonably high and that the tariffs had been filed without adequate cost justification.[5] NAB requested that the Commission undertake an expedited independent analysis of the program audio special access rates and make rate adjustments which would ameliorate the adverse consequences to broadcasters.[6]

5. In the *August 14 Order*, the Bureau found that NAB had filed comments which addressed the deferred issues scheduled for consideration in Phase II. The Bureau concluded that since NAB's pleading was not responsive to the issues designated for Phase I of the investigation, it should not be considered as part of the record for that investigation. The Bureau did, however, state that it would consider the pleading in Phase II of the investigation, if NAB chose not to withdraw it, since it was directed to the issues to be discussed in that phase. NAB did not withdraw the pleading, thus the pleading will be considered in Phase II of the investigation.[7]

III. COMMENTS OF THE PARTIES

6. In its Application for Review, NAB contends that its July 24, 1985 comments, while not narrowly responsive to the issues outlined in the *May 24 Order*, were a correct and proper response to issues designated for discussion in Phase I of the investigation. NAB also contends that the Bureau erred by failing to consider the substantiation for NAB's request for emergency relief in the form of an expedited independent analysis of the rate increases. NAB now asserts that even if the radio broadcasters were to receive refunds at the conclusion of the investigation in this docket, such refunds would not provide adequate relief to broadcasters who had previously been forced to cancel programming which was in the public interest. NAB requests that this Commission adopt an interim prescription which would phase in the new rates at levels which the radio broadcasters could afford without having to cancel public interest programming.

7. Oppositions to NAB's Application for Review were filed by the Ameritech Operating Companies (Ameritech), the Bell Atlantic Telephone Companies (Bell Atlantic), and BellSouth Corporation (BellSouth). Ameritech asserts that the Bureau clearly followed the procedures outlined in the *May 24 Order* and that NAB's Application for Review must be rejected. Ameritech further asserts that NAB's request for interim relief from the special access tariffs, pending completion of the docket, is improper and unsupported.

8. Bell Atlantic asserts that NAB has not presented any persuasive reason why it should be permitted to present its rate level objections in a manner inconsistent with the procedures established by the Bureau. BellSouth also claims that NAB has failed to demonstrate that its comments filed on July 24, 1985 are pertinent to the issues designated in Phase I of the special access investigation. Both Bell Atlantic and BellSouth find no justification for NAB's failure to bring its concerns with respect to audio rate levels to the Commission's attention earlier in CC Docket No. 83-1145, the underlying investigation of access and divestiture related tariffs.

9. In its reply to the oppositions, NAB reiterates its request for interim relief, arguing that only one of the filing parties addressed the request in its pleading. NAB asserts that each of the opposing parties ignored the implications of the rate increases on the public interest.

IV. DISCUSSION

10. We do not agree with NAB that its comments were the correct and proper response to the issues designated for discussion in Phase I of the investigation. NAB's comments addressed exclusively those issues which were specifically deferred for discussion in Phase II. Therefore, we affirm the Bureau's decision to defer consideration of those comments.

11. The NAB request that this Commission prescribe an interim reduction in audio special access rates should not have been combined with the Application for Review.[8] The Bureau did not adopt any decision on that subject. Prescribing an interim reduction in an existing tariff rate in the absence of a final determination that the rate is unjust and unreasonable would not be consistent with the regulatory scheme described in Title II of the Communications Act. Under Sections 203-205 of the Communications Act, 47 U.S.C. §§ 203-205, once tariff revisions have become effective, we may not order a carrier to modify or withdraw such revisions until an investigation has been conducted which finds the tariff unlawful. *MCI v. FCC*, 561 F.2d 365, 374 n.44; *AT & T v. FCC*, 487 F.2d 865, 875; *Nader v. FCC*, 520 F.2d 182, 198 (D.C. Cir. 1975). Congress empowered this Commission to adopt accounting orders and to order refunds at the conclusion of a rate investigation in order to protect ratepayers who may have been subjected to excessive charges. Prior orders have specifically stated that the reasonableness of the program audio rates will be examined during Phase II of the special access investigation.[9] An accounting order has been adopted that will enable us to require refunds to radio broadcasters and other program audio subscribers if we find that such relief is warranted at the end of Phase II. NAB has not demonstrated that the additional relief it requested would be justified.

V. ORDERING CLAUSE

12. ACCORDINGLY, IT IS ORDERED that the Application for Review and Petition for Interim Relief filed by the National Association of Broadcasters IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (*Designation Order*).

[2] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-70 and FCC 85-100, released Feb. 19, 1985 and Mar. 8, 1985, respectively.

[3] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released Aug. 14, 1985 (*August 14 Order*).

[4] *Id.* at para. 5.

[5] NAB Comments at i, July 24, 1985.

[6] After the rate increases for audio and video services went into effect in April 1985, the Informal Complaints Branch of the Enforcement Division received approximately 200 complaints. A Notice of Informal Complaint was served on each carrier along with an information request to determine what caused the increases that prompted these 200 complaints. Examination by the Tariff Review Branch indicated that: (1) the complaints did not result from jurisdictional status change; (2) 75 percent of the customers were being billed correctly, while 25 percent were billed incorrectly (these have since been corrected); and (3) 74 percent of the customers were backbilled for a period averaging two to three months. The Commission then advised the complainants that the audio and video rates would be investigated in CC Docket 85-166, Phase II and that the complaints and all related correspondence would be made a part of the record in that proceeding.

[7] *See August 14 Order* at para. 5.

[8] *See* 47 C.F.R. §§ 1.44(a), 1.44(d), and 1.115(c).

[9] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Mimeo No. 2057, released Jan. 17, 1986 at para. 7. *See also* Letter from Chief, Common Carrier Bureau to all Tier 1 local exchange carriers, released Aug. 4, 1986, requesting disaggregated special access data. The Bureau specifically requested that the carriers include information relating to program audio rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Cyril E. Sagan

against

Pennsylvania Public
Television Network

and

Television Station WQED
Pittsburgh, Pennsylvania

ORDER

Adopted: September 23, 1986 ; Released: October 8, 1986

By the Commission:

1. The Commission has before it an application for review filed by Cyril E. Sagan on July 14, 1986. Mr. Sagan sought review of the Mass Media Bureau's denial of his equal opportunities complaint against the Pennsylvania Public Television Network (PPTN) and television station WQED, Pittsburgh, Pennsylvania, regarding his exclusion from a political debate. PPTN filed an opposition on July 28, 1986. A copy of the Bureau's ruling is attached.

2. After a careful review of the complaint, we believe that the Bureau's ruling was correct, and that the application for review does not contain sufficient grounds to warrant reversal.[1] Therefore, pursuant to Section 1.115(g) of the Commission's rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

ATTACHMENT

(Citations corrected)

May 16, 1986
8330-Z
C5-64

Cyril E. Sagan
R.D. 2
Volant, Pennsylvania 16156

Dear Mr. Sagan:

This is in response to your complaint, filed May 5, 1986, with regard to your exclusion from a debate aired on television station WQED, Pittsburgh, Pennsylvania, on May 12, 1986.

In your complaint, you state that on April 25, 1986, you learned that a Democratic senatorial debate would be taped by the Pennsylvania Public Television Network ("PPTN") and aired over station WQED, a Public Broadcasting Service affiliate, and that, as a candidate, you were not invited to participate in it. You state that you made a number of unsuccessful attempts to reach officials at WQED, and then decided to contact PPTN. You state that, according to PPTN, your exclusion was based on the results of a public opinion poll conducted by the Pittsburgh Post-Gazette and the Philadelphia Daily News. You contend that this "highly questionable" poll represented an invalid method for determining which candidates should appear on this debate, because you believe it served to discourage potential voters from considering you for election. Section 315 of the Communications Act of 1934, as amended, provides that if a broadcaster permits a legally qualified candidate for public office to "use" a station's facilities, it must afford "equal opportunities" to all other candidates for that office. If, however, a legally qualified candidate appears on a bona fide news interview, bona fide news documentary, or on-the-spot coverage of a bona fide news event, such an appearance will not be deemed a "use" of a broadcasting station for purposes of Section 315.

As we informed you by telephone prior to the broadcast of the program, the Commission has determined that debates, whether sponsored by the broadcaster or another party, are generally exempt from "equal opportunities" as on-the-spot coverage of a bona fide news event, as long as such debates are broadcast for their newsworthiness and are not intended by the broadcaster to advance the candidacy of a particular individual. *See Aspen Institute*, 55 FCC 2d 697 (1975), *aff'd sub nom. Chisholm et. al. v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976). *See also Henry Geller*, 95 FCC 2d 1236 (1983). In *Henry Geller*, the Commission recognized that although Congress, in providing exemptions from Section 315, expressed a concern that the freedom and flexibility accorded to broadcasters in their news programming might result in favoritism amongst candidates, Congress intended to permit that risk in order to foster a more informed electorate. *Henry Geller*, *supra*, at 1244.

In accordance with this standard, the Commission has no authority to compel a broadcaster to invite a particular candidate to take part in a debate, nor can it force any candidate to appear and debate another candidate. *See*

American Independent Party and Eugene McCarthy, 62 FCC 2d 4 (1976), *aff'd sub nom. McCarthy v. FCC, No. 76-1915 (D.C. Cir. October 22, 1976), cert. denied*, 430 U.S. 955 (1977). The Commission's role is thus limited to reviewing the reasonableness of the broadcaster's determination that the event is indeed newsworthy.

In this case, you have provided no evidence whatsoever to support your contention that the decision of WQED to exclude you from the debate was unreasonable. Moreover, even if the program in question were not exempt and you were entitled to "equal opportunities," you would not have the right to appear on the same program as your opponents. *Conservative Party*, 40 FCC 1086 (1962).

In view of the foregoing, no further action is warranted on your complaint. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

FOOTNOTES

[1] We reject Mr. Sagan's argument that, because PPTN relied on a newspaper-conducted public opinion poll to determine which candidates to invite as participants, the debate was not a "bona fide news event." The only relevant concerns in determining whether such a program is "bona fide" are the program's newsworthiness and whether the licensee intended to promote an individual's candidacy. *Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd sub nom. League of* Wom en Vot ers v. FCC, 731 F.2d 955 (1983). Mr. Sagan has presented no evidence of intent on the part of PPTN or WQED to advance any particular candidacy. To the extent that Mr. Sagan challenges his exclusion from the debate based on his assessment that he is a major candidate, it has already been established that the sponsor of a debate is not required to invite all "major" or "serious" candidates to participate in a debate in order for that debate to come within the Section 315(a)(4) exemption. Am er ic an Ind ep end ent P arty and Eug en e McC arthy, 62 FCC 2d 4, 8 n. 3 (1976) (subsequent history omitted).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of

Request for Declaratory Ruling
Concerning the Citizenship
Requirements of Sections 310(b)(3)
and (4) of the Communications Act
of 1934, as amended

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1986 **Released: October 9, 1986**

By the Commission:

1.Before the Commission are petitions filed by TA Associates and Wiley & Rein requesting reconsideration or clarification of our *Declaratory Ruling*[1] construing the alien ownership provisions of the Communications Act of 1934, as amended.[2] In that *Declaratory Ruling*, we determined that limited partnership interests are subject to the citizenship requirements contained in Section 310(b)(3) and (4) of the Communications Act[3] and described the manner in which these statutory provisions applied to both partnership and corporate interests.

2. While neither petitioner has challenged the validity of our conclusion, in the *Declaratory Ruling*, that limited partnership interests are within the scope of the alien ownership provisions, the petitions before us question or seek clarification of five matters involving our construction of Section 310(b). First, TA Associates urges us to adopt a generic waiver for certain nonattributable alien investment in excess of the benchmarks contained in Section 310(b)(4). Second, that petitioner requests us to clarify that the "multiplier" is applicable to nonvoting stock to the same extent that it is used in conjunction with adequately insulated limited partnership interests. Third, TA Associates asserts that preferred stock should be excluded from the definition of "capital stock" contained in Section 310(b)(3) and (4) in situations in which that stock contains none of the indicia generally associated with equity ownership. Fourth, TA Associates asks that we define ownership interests in limited partnerships on the basis of partnership share rather than upon equity contribution. Fifth, with respect to the restrictions on alien ownership and positional interests established in Section 310(b), Wiley & Rein urges the Commission, in effect, to treat non-limited partners[4] in the same manner as "insulated" and nonattributable limited partners.

3. After a careful review of the petitions, we are persuaded to extend the scope of the "multiplier" to encompass remote nonvoting, common stock interests. We decline, however, to make any other changes requested by the petitioners in our interpretation of the alien ownership provisions of the Communications Act.

Public Interest Determination

4. TA Associates, a general partnership composed entirely of United States citizens, is a private venture capital management firm. It states that it holds investments in a variety of companies, including firms involved in broadcasting, cable television and cellular radio. TA Associates notes that its investments in communications companies usually include subordinated debt and equity securities. The latter are convertible, nonvoting stock which "give [TA Associates] the right, in certain cases, to obtain majority control of the communications companies in which [it] invests." [5] TA Associates also states that it is the sole general partner of venture capital funds structured as limited partnerships. According to the petitioner, "the vast majority of the capital"[6] for the funds is provided by investors, including aliens, who hold limited partnership interests which fully comply with the insulation criteria reflected in the Commission's attribution rules.[7]

5. In situations in which its investments are made in companies which hold controlling interests in Commission licensees, TA Associates requests the Commission to provide a routine and generic exemption from the statutory benchmarks contained in Section 310(b)(4) for the financing arrangements described in its Petition. It notes that the Commission, in its *Declaratory Ruling*, stated that it would entertain requests for an exemption to the benchmarks contained in Section 310(b)(4) on a case-by-case basis. Nonetheless, it asserts that, absent specific guidance by the Commission, the waivers could require a substantial amount of time to process and that such processing delays could, in turn, impede the financing of new communications entities by venture capital firms such as TA Associates. In this regard, the petitioner notes that the Commission, at the time that it revised the attribution rules, expressly recognized the importance of venture capital firms in the establishment and expansion of new broadcasting companies. Asserting that the purpose underlying the alien ownership restrictions is to guard against foreign influence in the broadcasting industry, TA Associates contends that its investments pose no danger that aliens will influence United States broadcasting because the "alien interests are plainly passive and totally insulated."[8] As a consequence, it argues that "there is no apparent public interest reason for case-by-case consideration of [its] investments."[9]

6. TA Associates suggests that the most useful and efficient mechanism by which to implement a generic exemption is by means of a certification procedure. Under this approach, the Commission would determine that the public interest standard embodied in Section 310(b)(4) is satisfied if a limited partnership with alien investments above the statutory benchmark certifies that:

> (i) management and operation is vested solely in the general partner;
>
> (ii) limited partners are expressly precluded from involvement in management and operational activities;
>
> (iii) limited partners have no authority to remove a general partner, nor may they admit a new general partner without the permission of existing general partners; and
>
> (iv) no limited partner acts as an employee, consultant or manager of the limited partnership nor provides any service to it or to any entity in which it invests (other than the advancement of funds).[10]

In effect, the petitioner requests the Commission to declare, without reference to a specific factual context, that the class of "insulated" alien investment generically described by TA Associates in its petition would not contravene the public interest standard of Section 310(b) notwithstanding the fact that such investment exceeds the ownership benchmark of that provision.[11]

7. We believe that adoption of the policy proposed by the petitioner would disserve the public interest. While we recognized, in the *Declaratory Ruling*, that conformance with attribution insulation criteria would be a significant factor in determining whether to permit alien investment above the statutory benchmark, we nonetheless specified that "the attribution criteria [would] not [be] exhaustive or dispositive."[12] The adoption of the equity benchmarks in Section 310(b) reflects congressional concern over substantial alien ownership of Commission licensees and persons or companies controlling these licensees even where the alien's ownership interest is non-influential in nature.[13] The fact that we have discretion to leave unchallenged alien investment above 25 percent in companies controlling a licensee does not negate our statutory obligation to scrutinize the relevant facts before affirmatively determining that the investment comports with the public interest.

8. The current case-by-case procedure assures that the Commission has the facts necessary for a meaningful public interest decision as to whether or not alien investment in excess of the ownership benchmark in Section 310(b)(4) comports with the public interest yet provides the agency with the flexibility to sanction alien investment above the statutory benchmark in situations where it is appropriate. In contrast, the adoption of of a generic approach, by its very nature, provides no assurance that the Commission would have available all facts that are relevant, and possibly determinative, to an informed public interest determination.[14]

9. In addition, we do not believe that policy reasons advanced by the petitioner would justify the adoption of this approach. In this regard, we are unpersuaded that the desirability of facilitating investment in broadcasting facilities supports a routine and generic determination that certain "insulated" alien investment in excess of the statutory benchmark comports with the public interest. Section 310(b)(4) reflects congressional policy to permit restriction of alien ownership of broadcasting facilities notwithstanding the fact that such a restriction, by its very nature, may foreclose certain types of investment in these facilities.[15] Further, while the petitioner correctly notes that processing individual requests entails administrative costs, we believe that these costs are an inevitable result of implementing Section 310(b)(4).

10. In conclusion, we believe that it would be inappropriate to generically and routinely find that certain alien investments which exceed the ownership benchmark of Section 310(b)(4) nonetheless meet the public interest criteria of that provision, either by a simple declaration that the financing arrangements described by TA Associates are always in the public interest or by the adoption of its proposed certification procedure. We find that the more prudent course of action is to make individualized assessments in the context of specific factual situations as to whether or not a particular ownership profile would further the public interest. We emphasize, however, that in denying the petitoner's request, we do not intend to prejudge the merits of any request by TA Associates, in a specific factual context, for a Commission ruling that alien investment above the statutory benchmark comports with the public interest.[16] Rather, we determine only that the petitioner has not justified the adoption of the broad generic approach that it has requested in this proceeding.

Applicability of the Multiplier to Nonvoting Stock Interests

11. TA Associates requests us to clarify that the "multiplier" applies in calculating the amount of equity held in a licensee through non-voting stock interests in a vertical ownership chain. While the petitioner notes that the Commission, in its *Declaratory Ruling*, employed a "multiplier" in computing remote interests held by aliens in a licensee through minority voting, stock and adequately insulated, domestically organized limited partnership interests,[17] the petitioner states that we did not address the use of a "multiplier" in connection with nonvoting, common stock. After careful consideration of the petitioner's arguments, we have decided to grant its request.

12. In applying the ownership benchmarks contained in Section 310(b), the "multiplier" is utilized to calculate the amount of equity held in the licensee through the ownership of non-controlling interests in a vertical chain. For example, the "multiplier" is used in quantifying the interest held by aliens in a licensee through non-controlling, voting stock in intervening corporations.[18] Similarly, we have employed a "multiplier" in computing the equity held in a licensee through intervening nonattributable limited partnership interests, and given the insulated nature of such interests, we have done so irrespective of the percentage of equity held by the limited partner.[19]

In the *Attribution Order*, we determined that non-voting stock, whether or not convertible to voting stock,[20] is not cognizable under the attribution rules.[21] The Commission reasoned that non-voting stock by its nature does not convey the ability to influence, let alone control, corporate affairs.[22] Because the holder of non-voting stock does not possess a controlling ownership interest, we find it appropriate to apply the "multiplier" to this type of ownership interest. Further, the non-controlling nature of this interest is unaffected by the quantity of non-voting stock which is owned; therefore, the "multiplier" will be employed irrespective of the percentage of stock held by the nonvoting shareholder.[23]

Treatment of Preferred Stock

14. TA Associates requests us to clarify the definition of "capitalstock" contained in Sections 310(b) (3) and (4) of the Act.[24] Specifically, it urges us to disregard preferred stock in determining compliance with the ownership benchmarks contained in Section 310(b) in situations in which the "equity" interest holders are functioning solely as subordinated lenders and the applicant certifies that the preferred stock contains none of the indicia normally associated with equity ownership.

15. We believe that TA Associates' request should be denied. It is an axiom of statutory construction that the language of a statute is, in general, the key to its meaning. As the United States Supreme Court has stated, it is "obvious . . . that, in determining the scope of a statute, one is to look first at its language;"[25] in the "[a]bsen[ce] of a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[26] In adopting the alien ownership restrictions presently codified in Sections 310(b)(3) and (4) of the Communications Act, Congress expressly restricted the amount of "capital stock" that aliens may own of record or vote in broadcast licensees or their parent companies. The term "capital stock" is generally understood to encompass various classes of stock, including preferred stock,[27] and we find nothing in the legislative history which would justify an

interpretation of this provision which contravenes its plain meaning. Accordingly, we shall consider preferred stock as "capital stock" in construing Section 310(b) of the Communications Act.

Definition of Ownership Interests in Limited Partnerships

16. In the *Declaratory Ruling*, the Commission determined to define ownership interests in a limited partnership in terms of the equity contributions of the limited partners.[28] TA Associates states that the use of contribution as the criterion of measuring ownership interests is inappropriate. It states that this measurement ignores customary business practices "in which passive investors receive equity in exchange for substantial cash contributions while active principals receive equity for much smaller cash contributions."[29] As a consequence, it urges us to substitute partnership share for contribution in calculating whether or not a licensee is in compliance with the ownership benchmarks contained in Section 310(b) of the Communications Act.

17. We recognize that contribution may not accurately measure the ownership interests in a limited partnership, particularly in situations in which a general partner obtains "sweat equity" in exchange for active participation in business management. However, based on our experience at this time, we are not convinced that reliance upon partnership share as the measure of ownership interest would provide a more appropriate measurement. For example, the use of partnership share as a means by which to quantify ownership interests under Section 310(b) is susceptible of manipulation. In this regard, the partners could agree that the alien investors would receive disproportionately small partnership shares but would have the opportunity to "recover" their investment by means of an inordinately high interest loan or receipt of other consideration outside the share provisions of the partnership agreement. In this situation, partnership share could seriously understate the actual equity interest of the aliens.[30] Moreover, because partnership share may be a volatile term in a partnership agreement, it is more difficult to ascertain than equity contribution. For example, partnership share may be computed upon a fixed percentage or be tied to a complex formula that in turn depends upon some variable term such as the amount of gross receipts or profits of the business in a specific year. In addition, the partnership may change the method of computing the share at any time. Finally, in light of the potential for manipulation and the possible complexity in computing partnership share, its use in quantifying the equity interest of aliens in a partnership could place substantial administrative burdens upon the Commission.

18. Given these considerations, we continue to believe that contribution offers the better approach to calculating alien limited partner ownership interests for purposes of Section 310(b) of the Act. We have already recognized, however, that in selecting a contribution or share based standard, we were confronted with the difficult task of choosing between reasonable policy alternatives.[31] Indeed, in the *Declaratory Ruling* we acknowledged that

> there may be other means, including partnership shares, by which such interests can be calculated. Further, if we find, through implementation of the statutory benchmarks, that the definition of ownership adopted in this *Declaratory Ruling* is inappropriate, we will revisit this determination.[32]

We reiterate our willingness to reconsider this determination if experience proves that reliance on contribution is inappropriate.[33]

Insulation of Non-Limited Partnership Interests

19. In the *Declaratory Ruling*, we determined that Section 310(b) – including the restrictions in that statute governing alien "officers" and "directors" – applied to partnerships and limited partnerships.[34] Recognizing that non-limited partners have the authority to bind the company and to manage its affairs, we concluded that these partnership interests were comparable to high level positional interests in a corporation and interpreted the restrictions governing alien officers and directors in Section 310(b) to encompass these types of interests.[35] In its petition, Wiley & Rein requests us to reconsider several aspects of our decision relating to the treatment of non-limited partners under Section 310(b) of the Act.

20. First, the petitioner objects to the Commission's decision to apply the statutory proscriptions relating to alien officers and directors to all non-limited partners. While the petitioner acknowledges that "non-limited partners characteristically do not relinquish day-to-day control"[36] over partnership affairs, Wiley & Rein asserts that these partners, if they choose, can insulate themselves from the management and operation of the partnership by means of private contractural arrangements.[37] The petitioner emphasizes that the Commission expressly excluded adequately insulated limited partners from the statutory restrictions governing alien officers and directors[38] and urges us to similarly exempt from these provisions "insulated" non-limited partners.[39]

21. In addition, the petitioner notes that the Commission, in its *Attribution Order*, permitted officers and directors of corporations holding cognizable interests in a licensee to be exempt from attribution by demonstrating that their duties are wholly unrelated to the activities of the licensee.[40] It contends that the Commission should extend this policy to the alien ownership provisions of Section 310(b). Specifically, the petitioner requests the Commission to exempt from the statutory proscriptions governing alien officers or directors alien non-limited partners who are insulated from involvement in the affairs of the licensee but who exercise control over other aspects of the partnership business.

22. We believe that our decision to include non-limited partners within the scope of the alien officer and director provisions of Section 310(b) was correct. The position which non-limited partners occupy in a partnership is directly comparable to that held by officers and directors in a corporation. Under state law, it is well-established that the management functions of a corporation are performed by the officers and directors[41] while in a partnership those functions are undertaken by the non-limited partners.[42] While it is true that these partners may not be precluded under state law from relinquishing control over partnership affairs,[43] we believe that such a relinquishment would be extremely unusual. The petitioner itself acknowledges that there is no independent business reason for a partner with unlimited liability to relinquish managerial power; indeed, it admits that the motivation underlying such a contractural arrangement would be to obtain an exclusion from the alien officer and director provisions contained in Section 310(b).[44]

23. Further, it would be inappropriate for us to "exempt" either "passive" non-limited partners or unattributed officers and directors from the scope of the alien

officer and director proscriptions contained in Section 310(b).[45] We have no power to accord a statutory "exemption" to a person holding a positional interest otherwise subject to the scope of Section 310(b) because he or she agrees, as a matter of private contract, not to exercise the powers inherent in that position.[46] As the petitioner correctly notes, our attribution rules permit corporate officers and directors to be relieved from attribution by disclaiming involvement in the management and operation of the licensee.[47] While the Commission may properly consider the existence of a private contractural relinquishment of managerial powers in determining to grant an exemption from its own administrative rules and policies, we have no power to accord a comparable exemption from a statutorily mandated proscription. Accordingly, we find that "insulated" corporate officers and directors -- and their functional equivalents in a partnership -- are fully subject to the restrictions governing positional interests contained in Section 310(b).

Procedural Matters and Disposition

24. This *Memorandum Opinion and Order* has been analyzed with respect to the Paperwork Reduction Act of 1980, as amended,[48] and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirement, and will not increase or decrease the burden hours imposed on the public.

25. Accordingly, IT IS ORDERED, THAT the "Petition for Clarification and Reconsideration," filed by TA Associates, IS GRANTED to the extent described herein and IS OTHERWISE DENIED.

26. Authority for the actions taken herein is contained in Sections 4(i), 4(j), and 405 of the Communications Act of 1934, as amended.[49]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, 103 FCC 2d 511 (1985) [hereinafter referred to as *Declaratory Ruling*].

[2] 47 U.S.C. § 310(b) (1982).

[3] 47 U.S.C. § 310(b)(3)-(4) (1982). Section 310(b)(3) in effect prohibits the grant of a broadcast, common carrier, aeronautical en route or aeronautical fixed radio station license to, or possession of such licenses by: (1) an entity which has any alien officer or director or (2) an entity in which more than 20% of the equity is owned or voted by aliens. Section 310(b)(4) contains comparable but less stringent restrictions relating to the ownership or positional interests of aliens in entities directly or indirectly controlling a licensee. Under Section 310(b)(4), "if the Commission finds that the public interest will be served by the refusal or revocation of such license" [47 U.S.C. § 310(b)(4) (1982)], such companies are barred from having (1) an alien officer, (2) a Board of Directors in which aliens exceed 25%, or (3) aliens holding or voting more than 25% of the equity interest.

[4] In this *Memorandum Opinion and Order*, the term "non-limited partners" is defined to encompass both the partners in a partnership without limited partners and the general partners in a limited partnership.

[5] "Petition for Reconsideration and Clarification," filed by TA Associates (July 25, 1985) at 3 [hereinafter referred to as TA Associates Petition]. Asserting that its intention in acquiring these securities is not to control or to operate communications companies, TA Associates states that it "does not anticipate that it will be necessary to utilize the conversion feature . . . very often." *Id.* at 4.

[6] *Id.* at 5.

[7] 47 C.F.R. § 73.3555, Note 2(g) (1985). *See Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, FCC 85-252 (released June 24, 1985), 50 Fed. Reg. 27438 (July 3, 1985) [hereinafter referred to as *Attribution Reconsideration Order*].

[8] TA Associates Petition, *supra* note 5 at 8.

[9] *Id.*

[10] *Id.* at 10. In the *Attribution Reconsideration Order*, the Commission stated that it would "scrutinize the close familial relationships" of a limited partner seeking an exemption from attribution. *Attribution Reconsideration Order*, *supra* note 7 at para. 50. While familial relationships are not addressed in any of the certification criteria suggested by the petitioner, we note that in its petition, TA Associates emphasized that the limited partnership agreements of the TA Funds comply fully with the insulation criteria established in the *Attribution Reconsideration Order*. TA Associates Petition, *supra* note 5 at 6-7. The petitioner also specifically represents that "none of TA's principals have any familial relationship with any of the aliens who have indirect ownership interests in the Funds." Id. at 6. Therefore, in addressing the matters raised by TA Associates, we shall assume that the certification procedure suggested by the petitioner would encompass all the insulation criteria established in the *Attribution Reconsideration Order*.

[11] Alien ownership issues arise in various contexts, including initial licensing and license renewal proceedings and applications for transfer or assignment. Licensees also confront the question of alien ownership in connection with filing annual ownership reports, FCC Form 323, as required by Section 73.3615 of the Commission's Rules.

[12] *Declaratory Ruling*, 103 FCC 2d at 524.

[13] The current statutory restrictions on alien ownership are derived from the Radio Act of 1927. Section 12 of that Act, inter alia, prohibited the grant or transfer of a license to "any company, corporation, or association of which . . . more than one-fifth of the capital stock may be voted by aliens . . . ." Radio Act of 1927, Pub. L. No. 69-632, § 12, 44 Stat. 1162, 1167 (1927), *reprinted in* Pike and Fischer Radio Regulation, Current Service at para. 20.12. When it adopted the Communications Act of 1934, Congress, inter alia, changed the scope of the statutory benchmark so that it applied to equity interests "owned of record *or* voted . . . by aliens." 47 U.S.C. § 310(a)(5) (1934) (emphasis supplied) [presently codified at 47 U.S.C. § 310(b)(3)-(4) (1982)]. See S. Rep. No. 781, 73rd Cong., 2d Sess. 7 (1934). We believe that the adoption of an independent restriction on equity ownership by aliens in addition to one relating to voting rights indicates a specific congressional concern about substantial equity investment by aliens. *See Declaratory Ruling*, 103 FCC 2d 517, 519, nn. 33, 37.

[14] In addition, as this approach is not based upon particularized facts, it would, a *fortiori*, preclude the Commission from assessing the cumulative impact of various types of relationships between an alien and the licensee.

[15] To the extent that the petitioner suggests that its status as a venture capitalist lends support for its approach to Section 310(b)(4), we disagree. The petitioner correctly points out that the Commission, in revising the attribution rules, expressly recognized that venture capital firms play a critical role in establishing and expanding new broadcast companies. *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 97 FCC 2d 997, 1016 (1984), *recon. granted in part*, FCC 85-252 (released June 24, 1985), 50 Fed. Reg. 27438 (July 3, 1985) [hereinafter referred to as *Attribution Order*]. In that proceeding, however, the Commission declined to accord venture capitalists "passive investor" status or otherwise exempt them from the generally applicable five percent ownership benchmark. *Id.* at 1016-17.

[16] We note that, as a practical matter, certification similar to that proposed by TA Associates submitted in connection with an application or request for declaratory ruling would be a significant factor in the Commission's ultimate resolution of the public interest issue and would substantially ameliorate the time delay concerns expressed by TA Associates. *See* para. 5, *supra*.

[17] *Declaratory Ruling*, 103 FCC 2d at 521-22.

[18] Id. at 522. In contrast, the "multiplier" is not employed in connection with any link reflecting a majority stock interest, as it conveys actual control. *Id.* at 521-22.

[19] *Id.* at 522.

[20] In the *Attribution Order*, the Commission reasoned that:

> If the contingency upon which the conversion right rests is beyond the control of the stockholder, attribution is clearly not appropriate, as no power to control or influence is even arguable. However, even if the contingency is within the stockholder's power to effect and its exercise may be imminent, until the stockholder actually has the power to vote, he should not be able to exercise influence or control subject to our rules. A "threat" to convert stock in order to vote is an empty gesture if such conversion would put the stockholder in violation of the multiple ownership rules. If such a conversion would not violate the rules, reliance upon it to exert influence does not contravene the purpose of the multiple ownership rules.

Attribution Order, 97 FCC 2d at 1021 (footnote omitted).

[21] *See* 47 C.F.R. § 73.3555, Note 2(f) (1985).

[22] *Attribution Order*, 97 FCC 2d at 1020.

[23] As noted above, non-voting stock holdings and adequately insulated limited partnership interests are both nonattributable ownership interests. We believe that it is appropriate to apply the "multiplier" to non-voting stock interests in the same manner as it is used in calculating nonattributable limited partnership interests.

[24] 47 U.S.C. §§ 310(b)(3)-(4) (1982).

[25] *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983).

[26] *North Dakota v. United States*, 460 U.S. 300, 312 (1983), *quoting Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

[27] *See, e.g., Warren v. King*, 108 U.S. 389 (1882).

> The [preferred] shares are shares of the capital stock of the company, though shares with different privileges from shares of common stock.
> . . . .
> [T]he preferred stock . . . is stock, and part of the capital stock, with the characteristics of capital stock.

108 U.S. at 396.

See also 11 W. Fletcher Cyclopedia of the Law of Private Corporations, §§ 5079 (capital stock), 5081 (stock), 5086 (classes of stock-common stock), and 5087 (preferred stock) (rev. perm. ed. 1986).

[28] *Delcaratory Ruling*, *supra* n.1 at n.42.

[29] TA Associates Petition at 12.

[30] While it is possible, as a theoretical matter, for the Commission to monitor every aspect of the financial relationship between the partners and the partnership to determine a "true" partnership share, this approach entails significant administrative burdens.

[31] *Declaratory Ruling*, *supra* n.1 at n.42.

[32] *Id.*

[33] As noted above, partnership share permits a greater amount of alien investment than a contribution based standard. If we were to adopt partnership share as a measure of ownership interest and subsequently determine that contribution is a more accurate measure, the licenses of those who relied upon the more liberal means of computing alien investment could be placed in jeopardy. In light of our stated willingness to reconsider this issue in light of experience, we believe it appropriate to adopt the more conservative alternative in order to prevent the potential for substantial business disruption.

[34] *See Declaratory Ruling*, 103 FCC 2d at 513-19.

[35] Id. at 520 n.43.

[36] "Petition for Reconsideration" filed by Wiley & Rein at 7 (emphasis omitted) [hereinafter referred to as Wiley & Rein Petition]. *See Attribution Order*, 97 FCC 2d at 1022.

[37] *E.g., Parks v. Riverside Insurance Company of America*, 308 F.2d 157 (10th Cir. 1962) [hereinafter referred to as *Parks*]; *Bernstein, Bernstein, Wile & Gorden v. Ross*, 22 Mich. App. 117, 177 N.W.2d 193 (1970) [hereinafter referred to as *Bernstein*].

[38] *See Declaratory Ruling*, 103 FCC 2d at 520 n.43.

[39] The petitioner states that non-limited partners who meet the insulation criteria contained in the *Attribution Reconsideration Order* should be presumptively exempt from the scope of the alien officer and director proscriptions.

[40] *See Attribution Order*, 97 FCC 2d at 1025-26; 47 C.F.R. § 73.3555, Note 2(h) (1985).

[41] "A corporation . . . can only act through its directors chosen by the stockholders and its officers chosen by the directors. And the board of directors is the central power which authorizes the executive agents of the corporation to enter into contracts and embark upon new business ventures." Fletcher, *supra* note 27, Ch. 11 at § 505 (footnotes omitted).

[42] Unless they otherwise agree, under state law, partners in a partnership without limited partners jointly manage the business of the partnership. Unless the partnership agreement or state law provides otherwise, Section 18 of the Uniform Partnership Act states that all partners "have equal rights in the management and conduct of the partnership business." Uniform Partnership Act, § 18 (1914). Similarly, unless the partners otherwise agree, the Uniform Limited Partnership Act provides that "a general partner of a limited partnership has the rights and powers . . . of a partner in a partnership without limited partners." Uniform Limited Partnership Act, § 403 (1976). Therefore, as a general rule, it is the non-limited partners in a partnership who occupy positions analagous to those of corporate officers and directors.

[43] *See Elle v. Babbitt*, 259 Ore. 590, 488 P.2d 440 (1971); *Parks*, *supra* note 37; *Bernstein*, *supra* note 37.

[44] The petitioner states that:

> Because general partners are subject to unlimited liability for the debts and obligations thereof in any event, there generally is nothing to be gained by expressly limiting their managerial rights even if, in fact, they play no role in management. However, if such limitations on managerial authority will avoid application of the "officer or director" prohibitions of Section 310(b)(3), a general partner might consider accepting such limitations.

Wiley & Rein Petition *supra* note 36 at 7 n.6.

[45] The petitioner also requested the Commission to extend the "multiplier" to encompass "insulated" non-limited partnership interests. Because this request is apparently premised upon the exclusion of "insulated" non-limited partnership interests from the scope of the officer and director proscription, we believe that it is unnecessary to address this request.

[46] *A fortiori*, we decline to grant a statutory "exemption" to non-limited partners who contract to relinquish managerial power over matters relating to the licensee but who retain the power to actively participate in other aspects of the partnership's business.

[47] 47 C.F.R. § 73.3555, Note 2(h) (1985).

[48] Federal Paperwork Reduction Act, 44 U.S.C. § 3501-3520 (1984 Supp.).

[49] 47 U.S.C. §§ 154(i), 154(j), 405 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

THE SELF-SUFFICIENCY ASSOCIATION

File No. BPTVL-810217FJ

For a Construction Permit
for a New Low Power Television
Station on Channel 2,
Austin, Texas

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1986 Released: October 7, 1986

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has under consideration an Application for Review filed February 21, 1986, by The Self-Sufficiency Association ("SSA"), of an action by the Mass Media Bureau, denying SSA's Petition for Reconsideration and returning the above-captioned application.

2. SSA tendered its application on February 17, 1981, and the Low Power Television Branch returned it on December 18, 1984. The return was necessitated because, based on specifications submitted by SSA on September 20, 1982, in an amendment to its application, the proposed facility was predicted to cause objectionable interference to Station KPRC-TV, Channel 2, Houston, Texas, in violation of low power television interference standards set forth in Section 74.705 of the Commission's Rules.

3. SSA submitted its petition for reconsideration on January 9, 1985. SSA argued that its application should be reinstated, because its amendment at section V, page 1 of the application form showed a typographical error with regard to the proposed facility's effective radiated power: a decimal point inadvertently appeared one point to the right of where it belonged, thereby showing 0.192 kW instead of 0.0192 kW. SSA claimed that the application as originally submitted was complete and sufficient, but nevertheless did not dispute the staff's finding that its own specification of 0.192 kW would have caused objectionable interference with KPRC-TV. The staff denied SSA's petition and noted that the specification of incorrect or inconsistent engineering data rendered an application defective and unacceptable for filing. The "complete and sufficient" acceptance standard, noted the Bureau, mandated the return of applications with engineering defects, citing, *inter alia*, *Garnerlynn Communications*, 99 FCC 2d 1176 (1984), *aff ' d sub nom. Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985); and *Katy Communications, Inc.*, 99 FCC 2d 677 (1984). The complete and sufficient standard, said the Bureau, did not allow the staff to guess an applicant's intent with respect to inconsistencies found in an application or in an amendment. The Bureau concluded that proper notice of the standard had been given and that the application and its amendment were properly returned.

4. In its application for review, SSA reiterates contentions raised in its petition for reconsideration. SSA maintains that an obvious typographical error, such as the misplacement of the decimal point, does not, in the absence of any other inconsistent technical information, constitute an insufficient engineering proposal. SSA notes that its amendment showed no changes in transmitter output power, transmission line or antenna gain which could have accounted for such a change in effective radiated power. SSA further argues that its application did not contain inconsistent engineering information and notes that all other points in the technical portions of the application made it clear that an effective radiated power of 0.0192 was being proposed. SSA charges that the Bureau had no information whatsoever to support a conclusion that SSA was proposing an effective radiated power of 0.192. SSA moreover attempts to distinguish two cases cited by the Bureau. First, it argues that in *Katy Communications, Inc., supra*, the applicant failed to submit a composite polar diagram for its proposed antenna, thereby preventing the Commission staff from processing the application further. Regarding the second case, *Garnerlynn Communications, supra*, SSA notes that the applicant failed altogether to propose a specific frequency offset. In the instant case, however, according to SSA, the processing of SSA's application could have proceeded if the staff had taken cognizance of an obvious typographical error that appeared nowhere else in its amendment or in the body of its application.

5. We find SSA's arguments unpersuasive and therefore affirm the Bureau's decision denying SSA's petition for reconsideration and returning its application. SSA does not dispute the fact that the Bureau, based upon information supplied by SSA, found predicted interference to KPRC-TV. SSA instead maintains that the Bureau's refusal to consider its application, notwithstanding the admittedly incorrect information, is drastic and unwarranted. We disagree. The complete and sufficient application acceptance standard used in the low power television and translator service was properly adopted in the 1982 rulemaking establishing the service. *Low Power Television Service Report and Order*, 51 RR 2d 476, 502 (1982) (" *LPTV Report and Order* "); *Salzer v. FCC, supra*. That standard requires applications and amendments to be letter perfect and mandates the Heturn of an application as defective if the facilities proposed therein are predicted to interfere with a full service television station.

6. The Bureau evaluated SSA's application on the basis of the information submitted in section V, page 1 of its amendment to its application form. SSA's argument that the Bureau should have deduced that SSA actually meant 0.0192 kW instead of 0.192 kW is unavailing. "Inaccurate information on applications delays the entire processing endeavor, and, under our strict acceptance standards, will result in nonacceptance of low power applications." *LPTV Report and Order*, 51 RR 2d at 504 n. 49.
In a similar case we recently affirmed the Bureau's return of an application for predicted interference which was based on the applicant's incorrect specifications. *See Tampa Broadcasting Corporation*, FCC 86-311, released July 8, 1986. "[I]t is not the agency's task to select for an applicant the type of operation that will minimize impermissible interference. We hold that the FCC gave notice to LPTV applicants that it will not perform this sort of a deduction; the burden was therefore on the LPTV applicant to submit a proposal acceptable to the FCC." *Salzer v. FCC*, 778 F.2d at 877.

7. We determined in the low power television rulemaking that the public interest would best be served by rigorous adherence to our application acceptance standards. "The Commission's limited resources and the large num-

ber of low power applications simply will not permit the staff to coach applicants in correcting defects or omissions in applications that have been filed, as sometimes has been the case in the past." *LPTV Report and Order*, 51 RR 2d at 502. Because of the contour overlap protection criteria used in processing low power television and television translator applications, one application can directly or indirectly affect hundreds of other applications in a daisy chain effect. Thus, the staff must be able to make an initial determination whether an application is complete and sufficient in order to expedite processing. If defective applications were allowed to be reinstated due to corrective amendments, the potential delay and disarray to hundreds of other applications would be devastating.

Additionally, each change in information contained in an application or addition of a returned application requires modifications to the engineering and/or directional antenna data bases and additional computer studies and staff analyses to determine mutual exclusivity with other pending applications. Later amendments to correct defects require the staff to process each application two or more times. Repeated processing will more than double the processing time for all pending applications, not just the application amended. With thousands of low power television and television translator applications still pending, repeated processing of applications and additional delays in processing are not acceptable and do not promote the public interest in receiving prompt service. *See, e. g., Kinetications, Inc.*, 99 FCC 2d 9, 171-72 (1984); *Citizen Television Corporation*, 100 FCC 2d 170, 174-75; *Howard LP Television, Inc.*, 100 FCC 2d 1391, 1393 (1985).

We therefore find irrelevant SSA's attempt to distinguish *Katy Communications, Inc., supra, and Garnerlynn Communications, supra*. Omitted or inconsistent engineering data essential to application processing, rather than being cause for reinstatement, render the application or amendment defective and, in and of themselves, justify return.

8. In view of the foregoing, we find that a grant of SSA's Application for Review is not in the public interest.

9. Accordingly, IT IS ORDERED, That the Application for Review filed by The Self-Sufficiency Association IS DENIED.

10. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this Memorandum Opinion by Certified Mail--Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TEMPO ENTERPRISES, INC.

File Nos. DBS 83-01, DBS 85-06

SATELLITE DEVELOPMENT TRUST

File No. DBS 83-02

NATIONAL CHRISTIAN NETWORK

File No. DBS 83-03

ADVANCED COMMUNICATIONS CORPORATION

File No. DBS 84-01

NATIONAL EXCHANGE SATELLITE, INC.

File No. DBS 84-03

DIRECT BROADCAST SATELLITE CORPORATION

File No. DBS 85-04

For Authority to Establish Direct Broadcast Satellite Systems

and

ADVANCED COMMUNICATIONS CORPORATION

File No. DBS 85-05-MP

For Modification of Construction Permit for Direct Broadcast Satellite System

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1986 Released: October 3, 1986

By the Commission:

1. On December 6, 1984, the Commission conditionally granted the applications for construction permits of Direct Broadcast Satellite ("DBS") systems of TEMPO Enterprises, Inc. ("TEMPO," formerly Satellite Syndicated Systems), National Christian Network ("Christian"), and Advanced Communications Corporation ("Advanced"). On February 26, 1985, the Commission also conditionally granted DBS construction permits for Satellite Development Trust ("SDT") and National Exchange Satellite, Inc. ("NEXSAT," formerly National Exchange, Inc.). Those construction permits were each conditioned on the respective permittee's due diligence in the construction of its authorized facilities, pursuant to Section 100.19 of the Commission's Rules. Under this rule, a permittee must begin construction or complete contracting for construction of its authorized facilities within one year from the date of the grant of the authorization. 47 C.F.R. §100.19.[1] That one year period has passed, and the permittees' compliance with this requirement is under consideration in this Order.[2] Also under consideration in this Order are the new DBS applications of Direct Broadcast Satellite Corporation ("DBSC") and TEMPO, and the modification application of Advanced.

Current Permittees

2. *TEMPO Enterprises, Inc.* TEMPO was originally authorized (under the name Satellite Syndicated Systems) to construct two satellites, each with six channels operating at 230 watts per channel. On September 3, 1985, TEMPO applied for a modification of those facilities to reduce power and increase the number of channels to operate on each satellite. On September 24, 1985, TEMPO requested that, in order to pursue its newly configured system, its existing construction permit be cancelled and its modifications be considered as a new application. Accordingly, the conditional construction permit of TEMPO will be cancelled; its new application is considered below.

3. *Satellite Development Trust.* On February 21, 1986, SDT "withdrew" its DBS application. Accordingly, its conditional construction permit will be cancelled.

4. *National Christian Network.* On December 6, 1985, Christian advised the Commission that it would relinquish its current authority in order to pursue a modified DBS system, stating that an appropriate application would be submitted in the future. Accordingly, its conditional construction permit will be cancelled.

5. *Advanced Communications Corporation.* On December 18, 1985, Advanced requested additional time to comply with the due diligence requirement. To justify an extension of time, Advanced cited its two modification applications[3] as delaying its ability to finalize contract terms. At that time, Advanced asserted that it was able and ready to sign a construction contract, but that its builder, RCA Corporation ("RCA"), had advised it that without Commission approval of its proposed modification, an "unresolved contingency" would exist which would preclude compliance with the due diligence requirement. However, when that matter was informally presented to the Commission's staff by Advanced, the permittee was advised that the pendency of the modification application was not a bar to compliance with the due diligence requirement. Accordingly, Advanced signed a construction contract with RCA and has now submitted its due diligence demonstration, supported by various sections of its construction contract and the affidavits of its president and of a representative of RCA.

6. A permittee's decision to modify a proposal authorized in an outstanding construction permit will not generally excuse its failure to meet the due diligence requirement. Otherwise, permittees could extend indefinitely their nonperformance by repeated modifications of their proposals. Any permittee which anticipates changes in facilities during the course of construction can provide for those changes in the construction contract, but construction must begin at some point. Contrary to Advanced's mistaken belief, any such contingencies involving the final configuration of the spacecraft(s) and the consequent final cost need not prevent the satisfaction of the due diligence requirement.[4] However, this apparently was not clear to Advanced at the time its due diligence deadline occurred. It did assert its readiness to act at that time. Significantly, it has enhanced the credibility of this claim by signing its construction contract immediately upon realizing the propriety of such action. Accordingly, Advanced's due diligence demonstration will be considered as

if it were timely. Other present and future permittees are on notice, however, that this clarification of this point eliminates this reason for failing to comply.

7. The information submitted by Advanced demonstrates its satisfaction of the first stage of the due diligence requirement. There is a contract, signed by both parties, which contains no unresolved contingencies which could preclude substantial construction of the satellites. The essential terms of the contract are verified by the submission of relevant portions of the document or by the principal's sworn statement as to contents, verified by RCA. Specific satellites and their design characteristics are identified, and dates for the start and completion of contruction are specified. The payment terms and schedule are described sufficiently to demonstrate the parties' investment/commitment to completion of the system. While the payments are not evenly spread through the contract term, the initial payments are significant, and the majority of payments are due during the middle phases, well before the end of the construction period. The major milestones in the construction schedule are provided, and with the payment schedule, establish the certainty of the plan and the reasonableness of its projection for timely completion. The schedules indicate that construction should be completed for the satellites by December 1990 and June 1991, permitting deployment within the six-year launch period required by Section 100.19(b) of the Commission's rules. 47 C.F.R. §100.19(b). Advanced's specific orbit/channel request is discussed below with its modification proposal, at paragraph 16.

8. *National Exchange Satellite, Inc.* On February 11, 1986, NEXSAT requested an extension of time for its due diligence performance. NEXSAT cites the pendency of two proceedings involving DBS service, a "Petition for Declaratory Ruling, DBS-DR-1, filed by United States Satellite Broadcasting Company, Inc., and the *Notice of Proposed Rulemaking* in General Docket No. 85-305 ("*Subscription Services Notice* "), 51 Fed. Reg. 1817 (January 15, 1986). The first is a request that the Commission declare that DBS channels may be used for purposes other than direct broadcasting services for an extended period of time if a DBS operator can demonstrate that its primary and ultimate interest is to provide DBS service and that it is pursuing that goal. The second proceeding addresses the regulatory regimen which is to be applied to providers of subscription services, including those operating in the DBS service. NEXSAT asserts that until these questions are answered it cannot know with any precision the type of system it should plan and cannot reasonably ask potential investors to put money into its system. It also claims that the regulatory uncertainty affects its ability to market its services. It seeks an extension of time for securing a construction contract until 180 days after the resolution of both of these proceedings. NEXSAT contends that no parties would be prejudiced by such an extension, as those which satisfy the due diligence requirement prior to NEXSAT can receive priority consideration for orbital and channel assignments.

9. NEXSAT's request for an extension of time will be denied. Intended and permissible uses of the DBS spectrum have been clearly identified, and parties must be prepared to operate within those bounds when they apply for facilities. Changed circumstances must, of course, be recognized when they arise, but the Commission and interested parties cannot presume at this time that the uses of the DBS spectrum will be modified. If any modifications were to be adopted in the future, they would simply inure to those parties which have proceeded under the current regimen. Also, other parties, as well as the public, would be prejudiced if NEXSAT were allowed to reserve channels and orbital positions and thereby prevent the grant of additional conditional construction permits.[5] Finally, the uncertainties which do exist are far different from and far less than those which necessitated the blanket extension of time provided in *Processing Procedures Regarding DBS Service*, 95 FCC 2d 250, 253 (1983), cited by NEXSAT. At that time, the questions of orbital positions, frequencies, channels, permissible power, polarization and many other technical parameters were unresolved, making basic mechanical system design virtually impossible. Those parameters are now established, regardless of the nature of service which ultimately may be approved and delivered. If any operational rules and policies are modified at some time in the future to make DBS more attractive or achievable for NEXSAT or its investors, NEXSAT can decide at that time whether to reapply and pursue a DBS service. Accordingly, NEXSAT's conditional construction permit will be cancelled.

New Applicants

10. On July 19, 1985, the Commission issued a Public Notice (Report No. DBS-4) accepting for filing the DBS application of DBSC. A cut-off date of September 4, 1985 was established for any additional applications to be considered with that of DBSC. During that period, a modification application was filed by Advanced and a new application was filed by TEMPO.

11. It appears that there are sufficient channels available to meet the requests of the qualified applicants and, therefore, as they are not mutually exclusive, each can be granted a conditional construction permit (47 C.F.R. §100.13(b)).[6] These construction permits will authorize the permittees to proceed with the construction of their systems and will be conditioned on each permittee's due diligence in beginning construction, or completing contracting for construction of its satellite(s) within one year, and beginning operation within six years, of the date of release of this Order (47 C.F.R. §100.19). Specific orbital positions and channels will be assigned to each permittee upon its demonstration of due diligence on a first-come, first-served basis, as has been the procedure for past applicants. *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC 2d 250 (1983).[7]

12. *Direct Broadcast Satellite Corporation.* On June 18, 1985, DBSC filed a new technical proposal, superceding the system for which it had been holding a construction permit.[8] DBSC is a corporation formed for the purpose of providing DBS service, and has no other business activities. Its primary principals are Kansas City Southern Industries, Inc., a company with operations in transportation, financial services, real estate and broadcasting, Wilbur L. Pritchard, and Satellite Systems Engineering, Inc., an engineering consulting firm of which Pritchard is the president, as well as a few of the other individual members of Satellite Systems Engineering. DBSC's qualifications were established in *Satellite Syndicated Systems, Inc., et al.*, 99 FCC 2d 1369 (1984), and there have been no significant changes since that time.

13. DBSC proposes to launch two satellites, with each serving half of the continental United States ("half-CONUS"), with sixteen channels at 100 watts each, for an effective isotropic radiated power ("EIRP") of 51 dBW at edge of coverage. DBSC will not employ a spare

satellite. Its preferred orbital locations are at 110 W longitude and 148 W longitude. Its spacecraft will be designed to provide quarter-CONUS service on demand, and it requests authorization to utilize up to four channels for spot beam coverage for regional broadcasts and for increasing EIRP for high definition television. DBSC will lease its transponder capacity on a non-common carrier basis. It estimates an increase in cost of less than 5% over its earlier approved system.

14. As DBSC is qualified and its proposal is consistent with domestic and international regulations and policies, its application will be granted. However, DBSC's request for spot beam usage raises the question of efficient spectrum utilization, as the use of channel for a spot beam effectively prevents that channel from being used for larger area coverage. While this usage will be authorized at present, continued operation in this mode will be subject to sufficient spectrum availability. *CBS, Inc., et al.*, 92 FCC 2d 64, 104 (1982).

15. *Advanced Communications Corporation.* On August 30, 1985, Advanced timely filed an application to modify its existing permit to add channels to each of its authorized satellites. Additional information was submitted on August 22, 1986. Advanced still proposes to launch two satellites, with each serving half-CONUS. Advanced also proposes to serve Alaska, Hawaii, Puerto Rico and the Virgin Islands. Its satellites will now provide sixteen channels each at 125 watts per channel (at beginning of life), for an EIRP of "at least" 51dBW at edge of coverage. Advanced has no current provision for a spare satellite.

16. Advanced's construction contract contemplates this modified proposal. In conjunction with its due diligence demonstration, Advanced has requested the assignment of all odd-numbered channels at orbital positions 110 W (for eastern service) and 119 W (for western service). Those assignments are available at this time. However, the technical analysis of Advanced's proposal has not yet been completed. Therefore, the Mass Media Bureau is directed to authorize the construction and launch of Advanced's proposed satellites and to assign the requested orbital positions and channels if its technical analysis demonstrates the conformance of Advanced's proposal with relevant technical parameters.[9]

17. *TEMPO Enterprises, Inc.* TEMPO is a new name for Satellite Syndicated Systems, whose ownership has not changed in any way since its qualifications were established in *Satellite Syndicated Systems, Inc., et al., supra.*

18. On September 3, 1985, TEMPO requested modification of its permit to add channels to each authorized satellite and to reduce power on each channel. At that time, TEMPO stated that, if required to elect inclusion between groups of applicants, it chose to be considered with the group begun by DBSC. Three weeks later, on September 24, TEMPO clarified its intent to pursue its changes as a new application rather than continue under its existing permit. This election was acknowledged and so announced in the Public Notice accepting TEMPO's application for filing and setting the cut-off date for the filing of comments and petitions to deny. Report No. DBS-4B, October 1, 1985.

19. TEMPO proposes to launch two satellites, with each serving half-CONUS, with sixteen channels at 100 watts each, for an EIRP of 51dBW. It will also serve Puerto Rico and the Virgin Islands. It will include redundant capacity for its high power amplifiers and will also build one on-ground spare. Its preferred orbital locations are 110 W and 148 W. TEMPO proposes to maintain operation of only one or two of its channels, apparently intending to lease the rest on a non-common carrier basis. As TEMPO is qualified and its proposal is consistent with domestic and international regulations and policies, its application will be granted.

20. *General Matters.* As a final matter, permittees have submitted only vague proposals for their tracking, telemetry and command ("TT&C") functions, or none at all, and none for earth uplink facilities. As the time required for construction of these facilities is shorter than for satellites, it is not necessary for any permittee to begin its construction at the same time. Nonetheless, it is assumed that these proposals and applications will be submitted promptly. These permittees are advised that, in order to facilitate planning by the Commission and other current and potential DBS permittees, they may be required to submit their proposals for TT&C functions at some specific date in the future upon 30 days' notice. As the channels to be utilized for their programming uplinks will correspond to their broadcast (downlink) channel assignments, their earth station applications can be tendered whenever desired.

21. Accordingly, IT IS ORDERED, That the conditional DBS construction permits of TEMPO Enterprises, Inc., Satellite Development Trust, National Christian Network, and National Exchange Satellite, Inc. ARE CANCELLED.

22. IT IS FURTHER ORDERED, That the DBS application of Direct Broadcast Satellite Corporation to provide service from two satellites, each to deliver sixteen channels to half of the continental United States, as described in this Order and its application, File No. DBS 85-04, IS GRANTED, subject to the following conditions:

(a) This grant does not include launch and/or operational authority for any phase of the proposal;
(b) This grant does not include the assignment of frequencies or orbital positions for any satellite; and
(c) The applicant must proceed with the construction of its system with due diligence as defined in Section 100.19 of the Commission's Rules (47 C.F.R. §100.19).
(d) The continued operation of spot beams will be subject to sufficient spectrum availability.

23. IT IS FURTHER ORDERED, That the DBS modification application of Advanced Communications Corporation to provide service from two satellites, each to deliver sixteen channels to half of the continental United States, as described in this Order and its application, File No. DBS 85-05-MP, IS GRANTED, subject to conditions (a), (b) and (c) in paragraph 22, above.

24. IT IS FURTHER ORDERED, That the Mass Media Bureau SHALL AUTHORIZE Advanced Communications Corporation to construct and launch two satellites to provide DBS service on channels and at orbital positions requested if and when technical analysis of Advanced's proposal indicates that such service conforms with all relevant technical considerations, subject to whatever restrictions the Bureau finds necessary.

25. IT IS FURTHER ORDERED, That the DBS application of TEMPO Enterprises, Inc. to provide service from two satellites, each to deliver sixteen channels to half of the continental United States, as described in this Order and its applicapation, File No. DBS 85-06, IS GRANTED, subject to conditions (a), (b), and (c) in paragraph 22, above.

26. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send a copy of this Order by Certified Mail - Return Receipt Requested, to each of the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] The due diligence requirement also requires that the satellite station(s) be in operation within six years of the construction permit grant. *Id.*

[2] Hughes Communications Galaxy, Inc. also was granted a conditional construction permit on December 6, 1984. Its due diligence showing was approved on January 24, 1985, and it was given orbital and channel assignments and launch authority on that date by the Chief, Mass Media Bureau. Its application and performance are not now under consideration.

[3] Advanced's first modification application was considered and approved on September 19, 1985. *RCA American Communications, Inc.* (Mass Med. Bur., Mimeo No. 7115). Its second modification application is considered in this Order.

[4] The contingencies which the Commission has disallowed in the past raised questions as to whether any spacecraft at all would be completed. *See e.g., CBS, Inc. and Dominion Video Satellite, Inc.*, 98 FCC 2d 1056 (1984); and *CBS, Inc.,et al.*, 99 FCC 2d 564 (1984).

[5] NEXSAT contends that other parties are not prejudiced as long as specific orbital and channel assignments are not made to it. This, however, only recognizes the rights of other parties already holding conditional construction permits. The ability of pending and future applicants to receive conditional construction permits is dependent on the overall availability of DBS channels and orbital locations which would be reduced were NEXSAT permitted to continue to hold its conditional permit despite its decision not to advance its construction at this time.

[6] As a general matter, it is noted that Title III obligations may extend to those DBS licensees which will not program their channels themselves. *See N. A. B. v. F. C. C.*, 740 F.2d 1190 (D.C. Cir. 1984). The approval of any of these applications does not reflect a judgment or determination regarding the regulatory assessment that will be ultimately applied to the licensee and/or its customers. This matter is the subject of a rulemaking proceeding, *Subscription Services Notice, supra,* and will be resolved subsequently.

[7] There are a number of other conditional DBS construction permits currently outstanding. *RCA American Communications, Inc., et al.*, Mimeo No. 7115 (Mass Media Bur., Sept. 19, 1985). If any of the subject permittees submits an acceptable due diligence showing before any current permittee that was previously awarded a conditional construction permit, such subject permittee will receive prior consideration for channel and orbital assignments.

[8] On the same date, DBSC relinquished its construction permit of October 10, 1984, and on July 19, 1985, the Commission acknowledged the relinquishment in the Public Notice (DBS-4), which established the closing date for this group of DBS applicants.

[9] Service to western half-CONUS, Alaska and Hawaii from 119 W is not contemplated in the Region 2 Plan adopted at the 1983 Region 2 Adminstrative Radio Conference, and Advanced will be subject to any limitation on its operation which is necessary to insure that such service, if approved, complies with interference constraints imposed by the provisions of the Plan and other applicable international agreements.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-523

In the matter of

Amendment of Part 74 of the
Commission's Rules and Regulations
In Regard to the Instructional
Television Fixed Service

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1986 Released: October 3, 1986

By the Commission: Commissioner Dennis not participating.

1. Before the Commission are petitions for reconsideration of its *Memorandum Opinion and Order* in MM Docket No. 83-523 (" *ITFS Reconsideration Order* "), 59 RR2d 1355 (1986), filed by three law firms on behalf of several of their clients,[1] and by the Hospital Council of Western Pennsylvania, the Mineola Union Free School District, and the Board of Education of the Township of Union.[2] Two of the joint petitions for reconsideration filed by the law firms are opposed by Network for Instructional Television ("NITV"), and one joint petitioner replied to NITV's opposition. The joint petitions are supported in comments by Brown University.[3]

2. The *ITFS Reconsideration Order*, *supra*, confirmed in most respects the rule modifications adopted for the Instructional Television Fixed Service ("ITFS") in *Second Report and Order* in MM Docket No. 83-523 ("*ITFS Order* "), 101 FCC 2d 49 (1985). The *ITFS Reconsideration Order* also added two new rules to those previously adopted.[4] One rule permits the amendment of certain ITFS applications during a limited period of time. The other adds a new preference category to the selection procedure for mutually exclusive applicants. Both of these new rules are challenged in the petitions for reconsideration.

Amendment of Nonlocal Applications

3. In *ITFS Order*, *supra*, the Commission determined that local entities are the parties most able to provide the best ITFS service. *Id.* at 56. In order to facilitate the award of ITFS facilities to local entities where possible, it established a local priority period, during which time only local entities would be eligible to apply for and receive authorizations for ITFS facilities. (47 C.F.R. §74.932(a)(1).) In this connection, the pending, cut-off applications of nonlocal entities will be disregarded if they conflict with a local application.[5] In *ITFS Reconsideration Order*, *supra*, the Commission provided a limited period of time during which any nonlocal applicant will be permitted to amend its cut-off applications to install local parties in its place, without loss of cut-off status. This provision avoids summary dismissal of the nonlocal applications where they are mutually exclusive with local applications if other local parties with which the nonlocal entity had been involved wish to pursue the application.

4. The petitioners contend that the amendment provision is prohibited by Section 74.911(b) of the Commission's rules, which classifies a change in ownership as a major amendment, requiring treatment, in effect, as a new application, thereby losing cut-off status and requiring a new cut-off procedure.[6] The procedure adopted, however, which was arrived at in the process of a rulemaking proceeding, obviously constitutes a consciously approved exception to the general rule. The Commission expressly considered the necessity of accepting these changes as *pro forma* assignments in order to maintain cut-off status. *ITFS Reconsideration Order*, *supra* at 1364-65. The Commission has the authority to create such general or limited exceptions to its own rules. 47 C.F.R. §1.3.

5. Petitioners also contend that in so circumventing the Commission's cut-off rules, the provision violates the due process rights of bona fide local applicants, and does so without accomplishing its stated goals. They point to the *ITFS Reconsideration Order*, *supra* at 1364-65, as evidence of the harm conceded by the Commission to befall local applicants as a result of the amendment provision.[7] They contend that they should not be exposed to this harm as they deserve continued cut-off protection. They claim to be supported by explicit and implicit Commission pronouncements that such cut-off protection has been earned, citing the *Further Notice of Proposed Rulemaking* in MM Docket No. 83-523, 98 FCC2d 1249, 1261 (1984), and the *ITFS Reconsideration Order*, *supra* at 1365. They also cite *Bronco Broadcasting, Inc.*, 36 RR2d 1587, 1590 (1976), and related cases for the proposition that a cut-off application achieves a "protected status." They add that they should be afforded protection because the Commission has already recognized that they are the best qualified applicants for the ITFS service. They argue that the Commission's latest action was unnecessary, as the institution of the local priority period was legal, so that the Commission would thus now violate due process for the benefit ofparties with no legitimate claim to rights. They further insist that there are no countervailing fairness considerations. Finally, they argue that in order to waive the cut-off rules, there must be unusual and compelling circumstances, not found here, citing *Baker - Smith Communications Co.*, 67 FCC 2d 548 (1978).

6. Petitioners have overlooked important considerations involved in the Commission's decision-making process. Petitioners' arguments rely on an interpretation of the Commission's position regarding nonlocal applicants that is not borne out in the decision, *i.e.*, that nonlocal applicants were considered unqualified and undesirable. The Commission only determined that nonlocal entities had no inviolable right to consideration of their current applications, but at the same time recognized that they had earned some consideration based on their timely filed applications and related efforts to comply with the rules then in existence.[8] Thus, the amendment provision exposes local applicants only to that amount of competition they faced when they originally filed their applications.[9] With regard to petitioners' contention that local applicants are the most desirable, the Commission agrees, and this action ensures the local nature of any applicants considered during the local priority period.[10] The Commission's action is not a retreat from the local priority period, and in fact the Commission explicitly reiterated its belief in the legality and propriety of that provision. *ITFS Reconsideration Order*, *supra* at 1361-63. The local priority period is in fact left in effect. The only qualification involved was the

Commission's refinement in limiting its consequences where it may not have been necessary to achieve the desired result of promoting local service.

7. Finally, the Commission did explicitly consider the harm done to cut-off local applicants by its action, but found specific countervailing factors of fairness and public benefit.[11] *ITFS Reconsideration Order, supra* at 1364-66. In this respect, the amendment provision does accomplish its stated objectives. Petitioners contend that the amendment provision provides little protection to nonlocal entities which must relinquish control over the applicant in order to avail themselves of the provision, and that it will not preserve the ownership benefits which the Commission recognized as possibly deriving from nonlocal licensees with a national network. However, the provision does provide protection to those nonlocal entities which are able and willing to effectuate their stated intention of intensely involving local parties in the operation of facilities. It merely gives a concrete, uniform and reliable form to those intentions. Only nonlocal entities which do not fully share those intentions or abilities will receive no such protection, but neither are they so entitled. Also, the involvement of nonlocal, national entities, even as participants with minority interests in the licensees, can provide the intended advantages of economies of scale and program exchange. Petitioners also argue that it does not provide the claimed protection to any local entities which relied on a national entity to represent its interests, as the nonlocal applicant is free to enlist any single or combination of the local parties with which it had already been associated. However, nonlocal entities will have every incentive to morefully develop the relationships which are most concretely established already, and no local party is any•less protected than it was originally, when it was fully reliant on a nonlocal entity which had no external an enforceable incentive to institutionalize the local entity's involvement.

New Applicant Preference

8. In *ITFS Reconsideration Order, supra*, the Commission determined that in mutually exclusive situations between competing applicants, where one is modifying an existing facility and one is proposing a new service, the net benefit to the public would be greater if new entities rather than established licensees were given opportunities to meet the increased demand for ITFS programming. *Id.* at 1375. To advance this end, the Commission amended the point selection system it had adopted in *ITFS Order, supra*, to add a new two-point preference for applicants that were not previously authorized to operate an ITFS station in the area for which they were applying. 47 C.F.R. §74.913(b)(3)(ii). This "new applicant" preference was put forth "to promote diversity in those cases involving unresolvable conflicts among proposed new applicants and existing licensees proposing new facilities". *ITFS Reconsideration Order, supra* at 1371. Petitioners contend that the new applicant preference would result in the arbitrary and inequitable treatment of ITFS applicants and an inefficient use of ITFS spectrum. In this regard, they point out that in a contest for three channels between an applicant which has no channels and an applicant which has an existing authorization for one channel, the new applicant would be effectively favored. This means that the existing licensee, despite having only one more channel than the new applicant, would suffer a significant competitive disadvantage in seeking any or all of the other three channels. Because of this, petitioners allege, the new applicant preference will also lead to requests for the maximum of four channels permitted by the rules (47 C.F.R. §74.902) regardless of need, resulting in the underutilization of the ITFS spectrum. Petitioners request that the new applicant preference be deleted from our rules or, in the alternative, modified to include certain existing ITFS licensees and permittees requesting additional channels for their facilities.

9. On further reconsideration, we recognize certain inequities and likely inefficiencies resulting from the new applicant preference as written. This preference would work against existing licensees, some of whom are the initial providers of ITFS with proven service records, that are seeking to add channels. On reconsideration, we do not find this to be a beneficial result in the balancing of the conflicting considerations, and accordingly, the new applicant preference will be deleted. In reaching this decision, we believe that the proper equilibrium has been restored in weighing the benefits flowing from diversity by new applicants and the need for current licensees to develop more fully the potential of their ITFS facilities. Our decision will return existing licensees seeking to expand channel capacity (within the four-channel limit) to an equal footing with new applicants. In so doing, the Commission recognizes the contributions of many of the early providers of ITFS service and reasons that the instant action will further the expansion of channel capacity for existing licensees and encourage efficient use of the ITFS spectrum, which benefits deserve equal weight with the new entrant policy.[12] We will, however, maintain the preference for applications for new channels, whether by new applicants or existing licensees, over other requests for signal or receive site changes through modifications of facilities, by adding a note to §74.913(b)(3)(i) that will make it clear that existing permittees and licensees which seek modification of their facilities for reasons other than the addition of channels will not be entitled to that two-point preference. [13] This will favor the greater increase in service that is represented by the addition of new channels as well as promoting diversity of ITFS offerings, which was the Commission's original intention in adopting the provision. Furthermore, the clarification of the four-channel limitation preference will make it clear that modification applications are on an equal footing with applications for more than four channels.[14] As applications for more than four channels are considered only after passing the waiver hurdle, such equal treatment between these classes of applications is appropriate.

10. Accordingly, IT IS ORDERED, That the petitions to deny filed on behalf of the first two groups of parties listed in footnote one, above, ARE DENIED.

11. IT IS FURTHER ORDERED, That the petitions to deny filed by the Indiana Higher Education Telecommunications System; Region IV Education Service Center; Rutgers University; Trans Video Communications, Inc.; Hospital Council of Western Pennsylvania; Mineola Union Free School District; and the Board of Education of the Township of Union ARE GRANTED IN PART, to the extent indicated herein.

12. IT IS FURTHER ORDERED, That Part 74 of the Commission's Rules and Regulations IS AMENDED, effective November 12, 1986, as set forth in Appendix A, under authority contained in 47 U.S.C. §§2, 4(i), and 303.

13. IT IS FURTHER ORDERED, that the Secretary SHALL CAUSE a Summary of this *Memorandum Opinion and Order* to be printed in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] One firm collectively represents Board of Trustees of Community College District No. 508, County of Cook and State of Illinois; Board of Trustees of the University of Cincinnati; School District No. 1 in the City and County of Denver and State of Colorado; University of Houston; Virginia Department of Information Technology; and Wisconsin Educational Communications Board. Another collectively represents the Arizona Board of Regents for Arizona State University; Board of Trustees of Michigan State University; Detroit Educational Television Foundation; Maryland Public Broadcasting Commission; Mohawk-Hudson Council on Educational Television, Inc.; New Jersey Public Broadcasting Authority; Western New York Public Broadcasting Association; and WHYY, Inc. Another collectively represents the Indiana Higher Education Telecommunications System; Region IV Education Service Center; Rutgers University; and Trans Video Communications, Inc.

[2] "Comments" were filed after the reconsideration deadline passed by the Diocese of Orange, California. Those comments reflect the same arguments as presented by the other petitioners.

[3] NITV has requested that the Commission strike Brown University's comments in support of the petitions, as they were filed at a time when only oppositions to the petitions are contemplated by the rules. NITV claims to be thus prohibited from responding, as there is no specific provision for further pleadings. As Brown University's comments merely express support for the petitions and add no new arguments or facts, their submission and consideration do not prejudice NITV.

[4] A number of other rules were also clarified or slightly modified, but as they are not challenged, they are not further discussed here.

[5] The Commission also provided for a significant preference for local entities when choosing among mutually exclusive applicants. 47 C.F.R. §74.913(b)(1).

[6] "A new file number will be assigned to an application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to result in a situation where the original party or parties to the application do not retain control of the applicant as originally filed" 47 C.F.R. §74.911(b).

[7] The Commission noted that adoption of the amendment provision would expose cut-off local applicants to competition of which they had been relieved by the local priority period. It also observed that the provision could prevent new local parties from gaining access to operators proposing to lease excess capacity, at least in some markets for a limited period of time. This latter consideration, however, is not relevant to existing cut-off applicants claiming violation of their existing rights.

[8] Petitioners also argue that the Commission has conceded that no local parties have demonstrated their reliance on nonlocal applicants, which the Commission assumed existed in concluding they had an interest meriting preservation. While this observation is accurate, it does not sustain petitioners' conclusion that no reliance occurred and these parties are thus not entitled to consideration. Petitioners argue that mere specification as a receive site is no evidence of reliance. While not conclusive, it is some evidence which seems to have been substantiated by the very prompt cooperation required to effect the required reincorporation and amendment within the specified ninety-day period. One nonlocal entity which failed to meet the amendment deadline specifically cited the difficulties it encountered in finding, educating and negotiating with new local parties. That applicant's requests for extensions of time, based on circumstances directly contrary to those contemplated by the Commission, were denied. *Hispanic Information and Telecommunications Network*, FCC 86-327, released July 28, 1986.

[9] It is appropriate to remind the petitioners here that, as we pointed out in establishing the local priority period despite the pending cut-off applications of nonlocal entities, the cut-off status they assert "was expressly intended as a strictly mechanical interim measure to cut off the flow of applications [to facilitate processing despite the pendency of a rulemaking proceeding]." *ITFS Reconsideration Order*, *supra* at n. 19.

[10] The Commission adopted specific provisions to ensure that any new applicant installed in the place of a nonlocal applicant would be securely controlled by local parties. *ITFS Reconsideration Order*, *supra* at para. 13. They are thus entitled to the same consideration as other local applicants. One petitioner has contended that there is some inherent harm in permitting a nonlocal party to determine the local makeup of a new local applicant. It has not substantiated this argument and the logic is not self-evident.

[11] Petitioners also cite a case in which the Court of Appeals reversed the Commission's determination to violate its cut-off rules in order to provide a perceived "fairness." *Reuters, Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986). That case, however, involved individual adjudication whereas the present proceeding is a rulemaking involving the subject provision. Furthermore, in the present case, the applicants at issue had complied with the procedural rules existing at the time.

[12] *See ITFS Reconsideration Order*, *supra* at para. 43.

[13] Section 74.913(b)(3)(i) awards "Two points for applicants whose requests, if granted, would result in the acquisition of four or fewer ITFS channels by that applicant within the particular area" 47 C.F.R. §74.913(b)(3)(i).

[14] One party has asked that the rules also be clarified to specify that studio transmitter links ("STL's") are not included when counting licensee's channels. The secondary (preemptible) nature of any STL utilizing an ITFS frequency precludes consideration of such a facility under the four channel limitation rule and the comparative preference for requests for four or fewer channels (47 C.F.R. §§74.902(d), 74.913(b)(3)). See *Report and Order*, in MM Docket No. 83-523, 98 FCC2d 925, 931 (1984). Accordingly, additional modification of the rules is unnecessary.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-523

In the matter of

Amendment of Part 74 of the
Commission's Rules and Regulations
In Regard to the Instructional
Television Fixed Service

ERRATUM

Released: October 10, 1986

1. On October 3, 1986, the Commission released a Memorandum Opinion and Order, *In re Amendment of Part 74*, FCC 86-409, resolving petitions for reconsideration of an earlier order regarding the Instructional Television Fixed Service. The appendix setting out the rule change adopted in that Order was inadvertently omitted, and is attached.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

47 CFR Part 74 is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

Authority: 47 USC 154 and 303

2. 47 C.F.R. §74.913 is amended by removing paragraph (b)(3)(ii); redesignating paragraph (b)(3)(i) as (b)(3); and adding new Note 3 to read as follows:

§74.913 Selection procedure for mutually exclusive ITFS applications.

* * * * *

(d) * * *

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Note 3: paragraph (b)(3) above does not apply to applications for modification of facilities other than the addition of channels.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BY DIRECTION LETTER

Adopted: September 26, 1986 Released: October 6, 1986

J. Brian DeBoice, Esquire
Cohen and Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: Request for an advisory opinion concerning §15 U.S.C. 1335.

Dear Mr. DeBoice:

This is in response to your letter of April 3, 1986, requesting an opinion on whether Marketing Technologies Group, Inc. (MTG) could, consistent with the provisions of 15 U.S.C. 1335, place advertisements for cigarettes on an in-store display system being marketed by MTG.

The MTG system, as described in your letter, would consist of video monitors located in retail stores which would display advertisements consisting of still pictures and audio messages. The monitors would not be capable of receiving off-the-air signals. Rather, the advertisements would be supplied by an in-store computer which, in turn, would receive data from MTG's "host" computer.

In operation, the computers would make telephone contact with each other; the host computer would provide the store computer with the schedule of advertisements for the ensuing period, usually one week; the store computer would search its memory to determine whether it had the scheduled advertisements, and, if not, it would request the required data from the host computer. Once the store's computer had all the necessary data, the telephone connection would be severed, and the store computer could commence display of the scheduled advertisements on the monitors. If any connection is established between the in-store computer and the host computer, the cycle of advertisements on the monitors would be interrupted for the duration of the communication between the computers.

As you are aware, Section 1335 provides:

> [I]t shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

15 U.S.C. 1335. You argue that, because of the mode of operation of the MTG system, inclusion of cigarette advertising would not violate Section 1335 since the advertisements would not be presented *on* a medium of electronic communication subject to Commission jurisdiction.

Initially, it should be noted that the authority to enforce Section 1335 lies with the Department of Justice. However, the Department has indicated that it will be guided by the views of the Federal Communications Commission, based on the Commission's technical expertise, as to whether a medium of electronic communication is subject to its jurisdiction.

A review of the MTG system described in your letter indicates that cigarette advertisements would not be presented on a medium of electronic communication subject to the Commission's jurisdiction. Although the system utilizes interstate telephone lines that are subject to the Commission's jurisdiction, it is not fair to say that the advertisements are presented on that medium. Rather, they are presented on video monitors which are incapable of receiving off-the-air signals. Thus, the medium of delivery of the message to the public is not subject to the Commission's jurisdiction. *Compare Joseph D. Peckerman*, 48 FCC 2d 1066 (1974) (Commission has jurisdiction over closed circuit system which also presented off-the-air programs).

In our view, the monitors are also sufficiently separated from the interstate telephone lines so that there is a clear break in the system. In this regard, we note that the advertisements are retained by the in-store computer for some period of time after their receipt from the host computer before they are transmitted to the monitor. Of equal significance, the system interrupts the cycle of advertisements on the monitors for the duration of any communications between the in-store and host computers.

Thus, there appears to be a substantial break between the medium of electronic communication subject to the Commission's jurisdiction and the instrumentality of delivery to the public. In such circumstances, the video display monitor on which the advertisements actually appear for viewing by the public is not a medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

BY DIRECTION OF THE FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 86-383

In the Matter of

Amendment of Sections 21.106(a)(3) and 94.71(c)(3) of the Commission's Rules and Regulations Relating to Emission Limitations for Digital Termination System (DTS) Equipment — RM-4838

NOTICE OF PROPOSED RULEMAKING

Adopted September 30, 1986 Released October 10, 1986

By the Commission:

I. INTRODUCTION AND SUMMARY

1. This *Notice* proposes a revision of the emission mask[1] standards for Digital Termination System (DTS) equipment specified in Sections 21.106(a)(3) and 94.71(c)(3) of the Commission's Rules, 47 C.F.R. §§ 21.106(a)(3), 94.71(c)(3). This action is in response to a Petition for Rulemaking filed by Local Digital Distribution Company (LDD). DTS equipment is local distribution equipment used in the Digital Electronic Message Service (DEMS) and in the operational fixed private radio service.[2] The current emission mask was designed to minimize adjacent channel interference for a narrowband DTS system originally proposed by Xerox Corporation that employed twenty 250 kHz subchannels within the 5 MHz DTS band.[3] Since the adoption of this standard, DTS equipment manufacturers have developed only wideband DTS systems. Such wideband DTS systems typically use subchannels of about 1500 kHz for extended DEMS networks and from 800 kHz to 2 MHz for limited DEMS networks.[4]

2. Because we believe the current emission mask standard may be imposing unnecessary manufacturing costs and design restrictions on DTS equipment without achieving a significant reduction in adjacent channel interference, we believe that the adoption of a less stringent emission mask, as proposed by LDD in its petition, will have the effect of reducing the cost and enhancing the performance of DTS equipment, but will not sacrifice interference protection.[5] Our initial analysis is that this change is in the public interest. We expect the adoption of the emission mask proposed by LDD will promote the further growth and development of DEMS, a service that has been slow to develop partially because of the cost of DTS equipment.[6] Our objective is to achieve the foregoing benefits without significantly increasing interference to adjacent channels. Although there is support for this position,[7] there are conflicting views.[8] Hence, we will rely heavily on the comments filed in response to this *Notice* for an analysis of the potential of the proposed change to cause interference.

II. BACKGROUND

3. The emission mask embodied in Sections 21.106(a)(3) and 94.71(c)(3) was adopted by the *First Report and Order* in Gen. Docket 79-188.[9] The Commission was well aware at that time that the emission mask proposed by Xerox was more stringent than the mask employed for point-to-point microwave services since 1974,[10] but adopted the rule in the belief it was necessary to eliminate most, if not all, forseeable adjacent channel interference.[11] The Commission noted that no adverse comments had been received from the 29 commenting parties despite the stringency of the proposed emission mask.[12]

4. Early last year LDD requested and received a temporary waiver of the current emission mask regulation.[13] LDD also filed a Petition for Rulemaking requesting that the Commission institute a rulemaking proceeding to modify the spectral emission limitations applicable to DTS equipment specified in Sections 21.106(a)(3) and 94.71(c)(3).[14] LDD proposes a less stringent emission mask in its petition and makes the following arguments to support its adoption.

5. First, LDD notes that the emission mask embodied in Sections 21.106(a)(3) and 94.71(c)(3) is based on the Xerox DTS System proposal that has not been implemented or even proposed by any other DEMS applicant or manufacturer of DTS equipment. LDD contends that DTS equipment currently authorized is substantially different from the type of equipment proposed by Xerox, and that cost considerations favor the continued implementation of wideband DTS systems.[15] LDD concludes that experience with digital point-to-point microwave services and the current design DTS equipment justify a less stringent emission mask. LDD contends that such experience has been favorable in that point-to-point systems have not received an unreasonable level of interference. LDD argues that adoption of a less stringent emission mask would serve the public interest because the performance of all current type-accepted equipment would improve as a result of the adoption of such standard.[16] LDD proposes that 800 kHz be chosen as the reference bandwidth, in lieu of the present reference of 250 kHz, since that is the narrowest bandwidth likely to be used in the marketplace.[17] Finally, LDD contends that the increase in potential adjacent channel interference will be negligible with the adoption of such a standard.

6. Several parties filed comments in response to public notice of the filing of LDD's petition for rulemaking.[18] NEC provided the only substantive arguments in opposition to the institution of a rulemaking proceeding.[19] GTE supports the proposal as applied to DTS systems operating in the 10.6 GHz band but, based on technical considerations, recommends a slightly different emission mask than that proposed by LDD for use in the 18 GHz band.[20] Harris also supports a relaxation of the technical rule but suggests that emissions attenuate to - 80 dB at 700 kHz beyond the band edge instead of at 900 kHz, as proposed by LDD.[21]

7. First, NEC contends that all DTS equipment manufacturers except LDD have complied with the current emission mask and that the divergence of current equipment designs from the configurations proposed by Xerox does not mean that the DTS technical standard should be relaxed. Second, NEC argues that relaxation of the present DTS emission mask will benefit only LDD to the detriment of all other parties concerned. NEC believes relaxation of the DTS emission limitations would needlessly enlarge the interference "dead zones" surrounding DTS transceivers[22] and would require frequency coordination for user stations to compensate for such increased interference.[23] Third, NEC contends that LDD has made certain critical assumptions in its engineering analysis of the potential interference to adjacent channels which are in-

correct[24] and that unacceptable levels of interference to adjacent channels would result from the adoption of the proposed emission mask.[25]

III. DISCUSSION

8. We propose that the digital point-to-point emission mask currently used for systems operating above 15 GHz[26] be modified as described herein and serve as the new standard for DTS systems operating in the 10 GHz band. The above 15 GHz mask requires emissions to fall-off to - 80 dB at 1.125 times the bandwidth beyond the band edge. As applied to a DTS subchannel of 800 kHz, the above 15 GHz mask would require that emissions attenuate - 80 dB at 900 kHz beyond the band edge. For a subchannel of 1500 kHz, the fall-off would have to take place within 1,688 kHz.[27] This mask provides greater flexibility than the present mask by permitting a more gradual fall-off in emissions to - 80 dB. The current DTS emission mask requires that the 80 dB attenuation occur 250 kHz from the band edge, without regard to the bandwidth of the subchannel.[28]

9. Finally, we propose that the DTS emission mask as set forth below be adopted for DTS systems operating in the 10 GHz DTS band. We have determined that institution of this rulemaking proceeding will serve the public interest because it has the potential of resulting in reduced DTS equipment costs and enhanced equipment performance, without significantly increasing interference to adjacent channels. In arriving at this conclusion, we considered the comments in support of and in opposition to LDD's petition for rulemaking. Our specific responses to these arguments are provided as follows.

10. First, we concur with LDD's principal arguments that the present emission mask is based on the Xerox DTS system proposal and that present DTS equipment significantly differs from the Xerox proposal which has not been implemented by any DTS manufacturer. The Xerox system proposal was abandoned before any construction occurred, and the DTS equipment that has been authorized employs subchannel bandwidths substantially wider than those proposed by Xerox: 1500 kHz for extended networks and from 800 kHz to 2 MHz for limited networks. The latter subchannel bandwidths, of course, permit DEMS carriers to provide more diverse services. We concur with the view that DTS equipment that employs wider bandwidths should be more cost effective than narrowband configurations, and we seek comments on what specific cost savings can be achieved in manufacturing DTS equipment using the proposed mask.[29]

11. NEC's argument that all known manufacturers of DTS transmitting equipment, with the exception of LDD, have achieved compliance with the present emission mask standard and that the standard should not be relaxed simply because current DTS equipment design differs from the Xerox proposal is not persuasive. The issue before us is not whether LDD can meet the standard, but rather whether the costs of the standard outweigh the benefits. The Commission's regulations and policies undergo continuing review to determine whether they continue to serve the public interest.[30] By the institution of this rulemaking proceeding, we merely commence the process of establishing whether our initial judgment – that the current standard is justified – is correct. We disagree with NEC's contention that only LDD would benefit from the relaxation of the mask to the detriment of all other parties concerned. It appears that a relaxation of the present mask would benefit all parties providing that the increased data rate capacity, expanded voice capacity, and longer range capability of DTS equipment that would result can be achieved without significantly increasing interference to adjacent channels.

12. Finally, extensive review of the conflicting adjacent channel interference arguments made by NEC and LDD is needed to resolve the interference issue. Any interference analysis is dependent on the underlying assumptions. In this case, there are conflicting opinions as to what are the proper assumptions. Both parties submitted worst case analyses. While there may be some engineering justification for such an approach, we believe that consideration should also be given to the likelihood that such a worst case would ever actually occur. For example, how likely is it that both the desired station and the undesired station would be operating in the same subchannel and be using the same polarization?[31] We believe that the proposed mask would offer adequate protection from interference in any situation that is likely to occur. However, we are hereby specifically soliciting comments on the analyses submitted by NEC and LDD. We request that interested parties address both the assumptions and analysis submitted by them and also the likelihood that such cases would actually occur.

IV. ADMINISTRATIVE AND PROCEDURAL MATTERS

>A. INITIAL REGULATORY FLEXIBILITY ANALYSIS

13. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, it is certified that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities because the proposed rule is a less stringent emission mask standard than the predecessor regulation. The economic impact of adopting the proposed rule is that DTS transmitter equipments will cost less to produce, and all DTS equipment will be capable of operating more efficiently, thereby providing greater and better service to the public at less cost.

B. PAPERWORK REDUCTION

14. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure or record retention requirements and will not increase or decrease burden hours imposed on the public.

C. NON-RESTRICTED RULEMAKING PROCEEDING

15. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation, that written summary must be served

to the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission rules, 47 C.F.R. § 1.1231.

V. NOTICE AND COMMENT PROCEDURES

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415 and 1.419, interested parties may file comments on or before December 1, 1986 and reply comments on or before December 16, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceedings. Participants must file an original and five copies of all comments and reply comments. If participants want each Commissioner to receive a personal copy of their respective comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

VI. CONCLUSION

17. Accordingly, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, we hereby give notice of our intent to adopt the rule provisions set forth below.

18. The Secretary shall cause a copy of the Notice to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 21 of Title 47 of the Code of Federal Regulations is to be amended as follows :

Part 21 --Domestic Public Fixed Radio Services

1. The authority citation for Part 21 continues to read as follows:

Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303.

2. *Section 21. 106(a)(3)is revised to read as follows* :

21.106 Emission limitations.

(a)***

(3) For Digital Termination System channels used in the Digital Electronic Message Service:

(i) In any 4 kHz band, the center frequency of which is removed from the frequency of the center of the Digital Electronic Message Service channel by more than 50 percent of the Digital Electronic Message Service channel bandwidth up to and including 50 percent plus the subchannel bandwidth (in the 10,550 - 10, 680 MHz band) or 500 kHz (in the 17,700 -19,700 MHz band): As specified by the following equation but in no event less than 50 + 10 $\log_{10}$N decibels:

(in the 10,500 - 10, 680 MHz band)

$$A = 50 + 0.0333 (F - 0.5B) + 10 \log_{10}N$$

(in the 17,700 - 19,700 MHz band)

$$A = 50 + 0.06 (F - 0.5B) + 10 \log_{10}N$$

Where:

A = Attenuation (in decibels) below output power level contained within the Digital Electronic Message Service channel for a given polarization.

B = Bandwidth of Digital Electronic Message Service channel (in kHz).

F = Absolute value of the difference between the center frequency of the 4 kHz band measured and the center frequency of the Digital Electronic Message Service channel (in kHz).

N = Number of active subchannels of the given polarization within the Digital Electronic Message Service channel.

(ii) In any 4 kHz band within the authorized Digital Electronic Message Service band, the center frequency of which is removed from the center frequency of the channel by more than the subchannel bandwidth (in the frequency band 10,550 - 10,680 MHz) or 500 kHz(in the 17,700 -19,700 MHz band) plus 50 percent of the channel bandwidth: As specified by the following equation, but in no event less than 80 decibels:

$$A = 80 + 10 \log_{10}N$$

(iii) In any 4 kHz band the center frequency of which is outside the authorized Digital Electronic Message Service band:

At least 43 + 10 log (mean output power in watts) decibels.

Part 94 of Title 47 of the Code of Federal Regulations is to be amended as follows :

Part 94 – PRIVATE OPERATIONAL - FIXED MICROWAVE SERVICE

1. The authority citation for Part 94 continues to read as follows:

Secs. 4, 303, 48 Stat. 1066, as amended, 1082; 47 U.S.C. 154, 303.

2. *Section 94. 71(c)(3) is revised to read as follows* :

94.71 Emission and bandwidth limitations.

*****

(c)***

(3) For Digital Transmission System channels:

(i) In any 4 kHz band, the center frequency of which is removed from the frequency of the center of the Digital Transmission System channel by more than 50 percent of the Digital Transmission System channel bandwidth up to and including 50 percent plus the subchannel bandwidth (in the 10,550 - 10, 680 MHz band) or 500 kHz (in the 17,700 -19,700 MHz band): As specified by the following equation but in no event less than 50 + 10 $\log_{10}$N decibels:

(in the 10,500 - 10, 680 MHz band)

$A = 50 + 0.0333 (F - 0.5B) + 10 \log_{10}N$ (in the 17,700 - 19,700 MHz band)

$A = 50 + 0.06 (F - 0.5B) + 10 \log_{10}N$

Where:

A = Attenuation (in decibels) below output power level contained within the Digital Transmission System channel for a given polarization.

B = Bandwidth of Digital Transmission System channel (in kHz).

F = Absolute value of the difference between the center frequency of the 4 kHz band measured and the center frequency of the Digital Transmission System channel (in kHz).

N = Number of active subchannels of the given polarization within the Digital Transmission System channel.

(ii) In any 4 kHz band within the authorized Digital Transmission System band, the center frequency of which is removed from the center frequency of the channel by more than the subchannel bandwidth (in the frequency band 10,550 - 10,680 MHz) or 500 kHz(in the 17,700 -19,700 MHz band) plus 50 percent of the channel bandwidth: As specified by the following equation, but in no event less than 80 decibels:

$A = 80 + 10 \log_{10}N$

(iii) In any 4 kHz band the center frequency of which is outside the authorized Digital Transmission System band:

At least 43 + 10 log (mean output power in watts) decibels.

FOOTNOTES

[1] "Emission mask" means the suppression or attenuation of radio frequency energy generated by radiation or conduction below the mean output power of the transmitter at a given frequency or across a band in accordance with a prescribed formula or specification. For example, the emission mask specified for the Digital Electronic Message Service (DEMS) at Section 21.106(a)(3) of the Commission's Rules has two main features: emission must be suppressed 50 dB at the band edge and 80 dB 250 KHz beyond the band edge.

[2] DEMS is a common carrier microwave radio service regulated under Part 21 of the Commission's Rules; DTS are also authorized as a private service under Part 94. *See* Digital Termination Systems, 86 F.C.C. 2d 360 (1981), *modified*, 90 F.C.C. 2d 319 (1982), *further modified*, 54 Rad. Reg. (P&F) 1091 (1983), *petition for review dismissed sub nom.* Alascom, Inc. v. FCC, 727 F.2d 1212 (D.C. Cir. 1984), *further modified*, 49 Fed. Reg. 37, 760 (September 26, 1984). A DEMS network consists of subscriber stations which employ highly directional microwave antennas and nodal stations which employ less directional or omni-directional microwave antennas. The nodal stations are interconnected by terrestrial microwave links or by satellite.

[3] DEMS was based on a proposal submitted by Xerox Corporation (Xerox) for a digital telecommunications network called XTEN. *See* Digital Termination Systems, 86 F.C.C. 2d 360 (1981).

[4] An extended DEMS network is comprised of DTS facilities in at least 30 Standard Metropolitan Statistical Areas (SMSAs), *see* 47 C.F.R. § 21.2 (definition of "extended network"); a limited network is comprised of DTS facilities in as few as one SMSA, *see* 47 C.F.R. § 21.2 (definition of "limited network").

[5] The adoption of the proposed emission mask will impact DTS equipment in several ways. First, DTS equipment designers will have the capability to design equipment that is inherently less costly than the present DTS systems because they will be able to eliminate some of the filters, attenuators, and other suppression devices that are used to comply with the present emission mask. *See* LDD, Petition for Rulemaking at 16. Second, relaxation of the mask will enable present DTS systems to operate more efficiently. More specifically, current DTS systems would be able to operate at higher output power levels which would result in increased data rate and expanded operating range. These improvements could be translated into more diverse services such as digital video conferencing, expanded voice capacity, or other services. *Id.* at 7. Harris and GTE concur with LDD's conclusion that increased data rate capacity and expanded range will result from adoption of the proposed emission mask. Harris, Comments to Petition for Rulemaking at 2 & 3; GTE, Comments to Petition for Rulemaking at 1 & 2.

[6] These purposes and objectives for development of DEMS are consistent with the policy positions previously established by the Commission. *See* Digital Termination Systems, 86 F.C.C. 2d 360 (1981).

[7] *See* LDD, Petition for Rulemaking at 16 & 17. *See also infra* para. 5.

[8] *See* NEC, Comments on Petition for Rulemaking. *See also infra* para. 7.

[9] *See supra* note 3 and accompanying text.

[10] *See* Report and Order in Gen. Docket No. 19311, 31 Rad. Reg. 2d (P&F) 727 (1974).

[11] *See* Digital Termination Systems, 86 F.C.C. 2d at 361.

[12] *Id.* at 368.

[13] *See* Local Digital Distribution Co., Mimeo No. 2487 (Common Carrier Bureau, Feb. 13, 1985).

[14] LDD's Petition for Rulemaking incorporates by reference the technical discussions and calculations made in its Petition for Waiver of the technical rules. *See supra* note 13. The Petition for Waiver is available in the public reference room of the Domestic Facilities Division, Common Carrier Bureau.

[15] LDD states all of the currently type-accepted systems use subchannels of about 1500 kHz for extended systems, and from 800 kHz to 2 MHz for limited DTS systems. These wideband systems are more economical to design and build and enable the DTS carrier to provide voice as well as message services. LDD, Petition for Rulemaking at 5. Despite the variation in design of DTS equipment from that proposed by Xerox, all DTS equipment manufacturers with the exception of LDD are in compliance with the emission mask standards set for in 47 C.F.R. §§ 21.106(a)(3) and 94.71(c)(3). *See infra* para. 11.

[16] LDD states relaxation of the mask as proposed will enable DTS equipment to operate at or closer to peak performance. Hence, increased data rate capability and longer range transmissions will be achievable. LDD, Petition for Rulemaking at 15-19.

[17] *Id.* at 13.

[18] Comments were filed by NEC America, Inc. (NEC); GTE Communications Systems Corporation, GTE Sprint Communications Corporation, and GTE Telenet Communications Corporation (collectively GTE); Harris Corporation (Harris).

[19] NEC's comments on Petition for Rulemaking incorporate by reference the objections raised in its Opposition to LDD's Petition for Wavier of the technical rules. *See supra* note 12. NEC's Opposition to Waiver is available in the public reference room of the Domestic Facilities Division, Common Carrier Bureau.

[20] LDD does not have any type-accepted 18 GHz DTS equipment in operation. All other users of 18 GHz DTS equipment are in compliance with the emission mask pertaining to these systems. Hence, we do not propose at this time changes that would affect 18 GHz DTS operations. The rule changes we have proposed herein are applicable only to DTS systems operating in the 10.6 GHz band.

[21] We do not propose the Harris recommendation that emissions attenuate to - 80 dB at 700 kHz beyond the band edge instead of at 900 kHz as proposed by LDD. The modified emission mask proposed herein is sufficiently flexible to accommodate the subchannel bandwidths selected by DTS system designers to satisfy the need of their particular system approach. *See infra* note 28.

[22] *See* NEC, Opposition to Petition for Waiver at 10 & 11. The term "dead zone" means that area surrounding a receive station in which no other station operating on an adjacent channel frequency in the same service area can be established. NEC is using the concept of a "dead zone" to quantify the interference effect of a transmitter that does not meet the present emission mask on other receive station's operations and on adjacent channels. NEC concludes that the failure of LDD's equipment to meet the emission mask will significantly increase the potential for interference into adjacent channel DTS stations using NEC equipment. *See* NEC, Opposition to Petition for Waiver at 11. LDD states that the increase in such interference will be negligible. *See* LDD, Reply to Comments on Petition for Rulemaking at 5.

[23] NEC, Opposition to Petition for Waiver at 12. This result would be contrary to the inherent system design for DEMS which allows user stations to be located anywhere within the nodal station's coverage area without prior frequency coordination. *See generally* Digital Termination Systems, 86 F.C.C. 2d 360 (1981); *cf.* 47 C.F.R. § 21.7(e) (separate construction permits are not needed for user stations; nodal station licenses specify the number of user stations to be licensed in the carrier's name).

[24] *See* NEC, Opposition to Petition for Waiver at 4 & 5. For example, LDD states that adjacent channel DTS stations will be colocated, that all DTS carriers will operate with equipment transmitting at the same output power level and that DTS licensees and applicants are specifying and using only LDD's equipment. *See* LDD, Petition for Waiver at 9 & 10. LDD attempts to explain these assumptions, and even states that it has the correct operating parameters for other manufacturers' DTS transmitters, which differ significantly from LDD's equipment, but nonetheless does not change its initial conclusion that the potential for increased interference to adjacent channels is negligible. *See* LDD, Reply to NEC Opposition to Petition for Waiver at 23-25.

[25] NEC, Opposition to Petition for Waiver at Exhibit B.

[26] *See* 47 C.F.R. § 94.71(c)(2).

[27] *See* LDD, Petition for Rulemaking at 12.

[28] We earlier considered but rejected the assignment of a subchannel bandwidth of 250 kHz. Our objective was to allow DTS system designers the flexibility to choose the subchannel bandwidth that would be best for their particular designs. *See* Digital Termination Systems, 86 F.C.C. 2d at 378 (1981). We reject the assignment of the 800 kHz reference bandwidth proposed by LDD for the same reason -- i.e., we wish to ensure that DTS system designers have sufficient design flexibility to choose subchannel bandwidths best suited to their respective designs. The modified emission mask proposed herein is sufficiently flexible to accommodate the subchannel bandwidths selected by DTS system designers.

[29] NEC, in opposing LDD's waiver request, argued that LDD's costs to comply with the current mask would be 4-6%. *See* NEC, Opposition to Petition for Waiver at 13-14. We ask all parties to establish, with specificity, precise cost savings.

[30] *See* Geller v. FCC 610 F.2d 973 (D.C. Cir. 1979).

[31] DEMS licensees, permittees and applicants are expected to cooperate fully in attempting to resolve problems of potential interference to other users and blocking of adjacent channel use in nearby SMSAs is prohibited. 47 C.F.R. § 21.504(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COAST TV **MM Docket No. 84-934**

File No. BPCT-840720KG

MISSION BROADCASTING CORPORATION **MM DOCKET NO. 84-935**

File No. BPCT-840723KI

SOLAR TELEVISION, INC. **MM DOCKET NO. 84-936**

File No. BPCT-840723KJ

For Construction Permit
Santa Barbara, California

Appearances

Chester F. Naumowicz on behalf of Coast TV; *Robert Lewis Thompson* on behalf of Mission Broadcasting Corporation; *Michael Couzens* on behalf of Solar Television; and *Paulette Laden* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: September 24, 1986; Released: October 3, 1986

I. Preliminary Statement

1. The above-captioned applications, together with three other subsequently dismissed applications,[1] were designated for hearing by *Order* released October 2, 1984. The *Hearing Designation Order* specified the following issues:

> (1) To determine with respect to each of the applicants . . . whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.[2]
>
> (2) To determine which of the proposals would, on a comparative basis, best serve the public interest.[3]
>
> (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By *Order*, released August 2, 1985 (FCC 85M-3011), modified by *Order*, released April 3, 1986 (FCC 86M-1159), the issues were enlarged as follows:

> (1) To determine whether or not Mission Broadcasting Corporation misrepresented facts or was lacking in candor in describing its ownership in its application as filed on July 23, 1984, and as subsequently amended on September 7, 1984; and
>
> (2) To determine, based upon the facts adduced under the foregoing issue, the effects, if any, on the basic or comparative qualifications of Mission to be a Commission licensee.

Hearing commenced on March 12, 1985, and was concluded on March 31, 1986, when the record was closed. Proposed findings and conclusions were submitted on July 22 and 23, 1986, and reply proposed findings and conclusions on August 18 and 19, 1986.

II. Findings of Fact

Coast TV

3. Coast is a limited partnership. Its partners are:

Name	Nature of Partnership Interest	% of Ownership[4]
Martha Correa	General	12
Patricia E. Montemayor	General	12
Ruth J. Smith	General	12
Jennifer Bigelow	Limited	1
George V. Castagnola[5]	Limited	7
Tomas A. Castelo	Limited	7
Gilbert Garcia	Limited	7
Shirley Kennedy	Limited	7
Walter Loster	Limited	7
Carlos Ornelas	Limited	7
Albert P. Pizano	Limited	7
James David Smith	Limited	7

4. Neither Coast nor any of its partners has any interest in any other medium of mass communications (Coast Ex. 1). All three of Coast's general partners are proposed to be integrated full-time into the management of the station, devoting at least 40 hours per week to their respective positions (Coast Ex. 2, 3 and 4).

5. Patricia Montemayor will be General Manager/Sales Manager. Her duties will include responsibility for overall day-to-day management of the station, establishment of administrative policies, effectuation of executive policies, and direct supervision of sales, promotion, advertising, marketing and public relations.

6. Ms. Montemayor is a female, Pacific Islander (Filipina) who has resided in Santa Barbara since 1967. Between 1971 and 1978, she co-owned a firm which produced radio and television commercials. During 1974 and 1975, she was the moderator of a Santa Barbara cable television program, and in 1976, she produced and moderated a radio program (Coast Ex. 3).

7. Ms. Montemayor has been involved in the following Santa Barbara activities:

a. Tres Condados Girl Scout Council, Inc. headquarters, Santa Barbara.
2/2/85 - President
2/82-2/85 - Corporate Secretary

b. Filipino Community Foundation of Santa Barbara - Non-profit tax-exempt foundation to serve Philipino youth in education and training.
7/84-Present - Trustee

c. Filipino Community Association of Santa Barbara, Inc. - Non-profit Association
Member since 1970, Corporate Secretary 12/83- 12/84

d. California Association of Affirmative Action Officers, Inc.
Co-Founder 1976, Secretary 1977-79, Vice President (Southern Region 1981-83), Board Member (Southern Region 1984 - present)

e. Santa Barbara Women's Community Building Project, Inc. Inc. 10/83 - Present - Member

f. League of Women Voters, Santa Barbara Chapter 1975-1984 - Member

g. National Women's Political Caucus, Santa Barbara Chapter 1980-1983 - Member

h. Santa Barbara/Goleta Chapter, National Organization for Women, 1970-1975 - Member

i. American Business Women's Assn., Fiesta Chapter (Santa Barbara)
1967-1982 - Member
1971-1972 - President
1974 - Woman of the Year

j. Greater Santa Barbara Advertising Club
1969-78; 1984-Present - Member - President
1969-78 - Vice President

k. American Advertising Federation, Region 15 (Southern California)
1971-1976 - Secretary

l. Intra-School Science Fair of Santa Barbara, Inc.
1971-1974 - Board Member and Publicity Chairperson

m. Vocational Instruction in Public Schools of Santa Barbara (VIPS)
1968-1970 - Chairperson Business Office Occupations Advisory Committee

n. Business & Professional Women's Club of Santa Barbara - 1972-1974

o. Santa Barbara County Personnel Association, Inc.
1972-Present - Member

p. South Coast Business Network (Santa Barbara Business Womens Group)
Charter and current - Member

q. Santa Barbara City - Civil Service Commission/ Affirmative Action Committee
1980-81 (approx.) - Appointed by the City Council

r. Santa Barbara City Schools and High School District - Affirmative Action Committee
1980-81 (approx.) - Appointed by the School Board

s. Westmont College (Greater Santa Barbara) Appointed
1979 - Member, Education Program Advisory Committee

t. Santa Barbara City College, Community College District
1978-Present-Member, Marketing/Management/Supervision Advisory Committee

u. University of California at Santa Barbara Affiliates
1980-1983 - Member

v. Gaucho Club, University of California at Santa Barbara
1980-1983 - Member

w. Goleta Valley Chamber of Commerce
1974-1975 - Board Member and Co-Chair of Research & Development Month Committee (2 years)

x. Santa Barbara County Beverage & Restaurant Assn.
1973-1975 - President

y. Senior Citizen's Placement Center of Santa Barbara
1975-1977 - Board Member

z. Santa Barbara County Executive Management Assn.
1978-1983 - Member

aa. Santa Barbara County Management Assn.

bb. American Society for Training and Development
1983-Present - Los Padres Chapter (Tri-County, Santa Barbara-Ventura-San Luis Obispo)

cc. American Management Association
1980-Present - Member

dd. Family Violence Advisory Council, Inc., of Santa Barbara
1976-1979 - Co-Founder and Board Member

ee. 1971-1972 - Member, Santa Barbara Chamber of Commerce

ff. 1/85-Present - Member, Santa Barbara City Schools & High School District Superintendent's Minority Steering Committee

gg. 1979-1981 - Member, Santa Barbara Community Advisory Committee, California Employment Development Department

hh. 1980-Present - Member, Advisory Board, Flexible Career Associates, Inc. (non-profit organization)

ii. 1980-Present - Resource person to the Business Office Education Advisory Committee, Santa Barbara Community College District

jj. 10/83-Present - Member & Co-Founder, Federal Contractors Liaison Committee of Santa Barbara County

kk. 10/83-1984 - Dinner Sponsor (First and Second Annual Awards) - Santa Barbara Hispanic Achievement Council

ll. 1978-Present - Member, Eucalyptus Hill Improvement Assn. (Santa Barbara Homeowners group)

mm. 1980-Present - Member, Ocean Meadows Women's Golf Club (Santa Barbara Area golf club)

8. Martha Correa will be Comptroller/Business Manager/Community Relations Director. Her responsibilities will include supervision of the station's business affairs and community relations activities. Ms. Correa is a female Hispanic who has resided in Santa Barbara since 1978. She is married to Coast limited partner Gilbert Garcia and is currently employed as an officer, director and administrator of Garcia Architects, Inc., and Garcia Associates, Inc. (Coast Ex. 2).

9. Her involvement in community activities has included:

a. Santa Barbara Chamber of Commerce, Member since 1978

b. Goleta Valley Chamber of Commerce (Corporate Member - 1980-current)

c. Bishop Garcia Diego High School Parent Association (1984-current)

d. Building Industry Association of Southern California (Corporate Member - 1978-1982)

e. Community Environmental Council, Inc. (Corporate Member - 1980-current)

f. Amigos of the Department of Spanish & Portugeuse - UCSB (1983-current)

g. The Affiliates - University of Santa Barbara (Corporate Member - 1982-current)

h. Notre Dame Parent Association (1982)

i. Goleta Valley Girls' Club - Board of Directors, President (1984-1985)

j. Director and Recording Secretary - Santa Barbara/Puerto Villarta Sister City Committee (Member - 1982-current)

k. Appointed Board Member of the Private Industry Council - County of Santa Barbara Program Committee (1984-current)

l. Board of Directors - Sheltered Services for Women, Inc.,

m. Volunteer 4 hours per week to the Catholic Social Services (August 1984-current)

10. Ruth Smith will be Program Manager of Coast's station. Her responsibilities will include supervision of programming, production, news, traffic and public affairs. Ms. Smith is a Black female who has resided in Santa Barbara since 1966. From 1966 to 1968, her residence was within the corporate limits of Santa Barbara, and since then she has resided in an unincorporated portion of the

community. She is married to Coast limited partner James Smith and is presently employed as President and Administrator of Miss Smith's Children Center, Inc., and as a consultant for science with Harcourt Brace, Jovanovich, Publishers. She proposes to resign from these positions "no later than the date upon which Coast's Santa Barbara television station commences operation" (Coast Ex. 4).

11. Ms. Smith's involvement in community activities has included:

a. 1967-Present - Member
Altrusa Club of Santa Barbara, Inc. U.S.A.
1968-78 - Altrusa International, Inc., District Eleven which includes Santa Barbara, and covers the Southwestern states and Hawaii

b. 1968-Present - Member
Delta Kappa Gamma Society (an honorary society of women and educators). Delta (Santa Barbara) chapter

c. Pi Lambda Theta (Honorary Society for women educators) Santa Barbara area chapter
1980-Present - Member

d. 1970's-Present - Member - Santa Barbara branch of Tri-Counties Association for the Education of Young Children

e. NAACP (National Association for the Advancement of Colored People) - joined the Santa Barbara Branch in late 1960's

f. 1983-84 - Afro American Community Services

g. 1981-83 - Member Chairperson Association of California School Administrators (Santa Barbara Chapter)

h. AAUW (American Association for University Women), Santa Barbara Branch - member since early 1970's

i. Child Guidance Clinic (Santa Barbara) - member of the early organizing committee to get the project established

j. Santa Barbara Council of Social Services 1973-1977 (approx.)

k. Santa Barbara County Schools
1975-82 - Member of Affirmative Action Committee
1981-83 - Certificated representative to the Personnel Policy Review Committee

l. 1983-Present - Member, University Club of Santa Barbara

m. Santa Barbara Museum of Art - Member (more than 10 years)

n. United Nations of Santa Barbara (Member during early 1970's)

o. Governor's Conference on Children and Families 1980

p. Martin Luther King Wing of the Eastside Library Project (Santa Barbara)
1968 1970 - Vice President and Chairman of the Architectural Committee

q. Santa Barbara Community Action Commission
1967-1972 - Member representing Santa Barbara County Superintendent of Schools

r. Upward Bound Project - served on the initial Advisory Committee for the University of California at Santa Barbara - served during 1966-1968;

s. 1976-1978 - seved as a member of the Teacher Credentialing Committee for Early Childhood Education at the University of California, Santa Barbara;

t. American Red Cross "Come and Learn Tutorial Program for Adult" (established and operated a volunteer program for two years - 1967-69)

u. Second Baptist Church - Member - 1966 - Current

v. 1982- Present - Member Santa Barbara Associates (Professional Women's networking association).

12. General partner Patricia Montemayor first became aware of the broadcast opening from Gilbert Garcia (Tr. 124). Garcia performed the initial interview of Montemayor, on behalf of Coast TV, and then reported to the group (Tr. 2007). Limited partner James David Smith first heard of the project from Garcia. Subsequently, a meeting was held with Smith, Garcia and another in Garcia's office (Tr. 1950). At length, Smith brought his wife, Ruth J. Smith, into the process (Tr. 1955 and Tr 560-561). The initial meeting that she attended was the first time that Ms. Smith had met Garcia (Tr. 562).

13. Coast TV Limited Partnership was formally created on June 29, 1984. Before that time, at a meeting held on June 14, 1984, the group determined to adopt a more formal structure. Ruth J. Smith urged that Gilbert Garcia be elected chairperson to preside at meetings. She recalls:

> "I felt that in that, from our point of view, he was initially involved in getting information to the group, and in the discussions that had followed throughout in the other meeting that we had held, I recognized that he had leadership qualities and I thought it was time for the group to move to the next point of a more organizational structure. Before then it was just totally informal.
> And we had made the decision at the this point that we were ready to move to another dimension. And I thought Mr. Garcia had exhibited the qualities that I felt could lead the group to another point of organization." (Tr. 577)

14. On cross-examination, Correa adopted counsel's suggestion that her husband, Gilbert Garcia, is or was the "key mover" behind the Coast application (Tr. 362-3). Garcia says he presided at Coast's organizational meetings because he "knew more" about the television project that the other partners (Tr. 2021). Garcia also had some role in preparing meeting agenda (Tr. 2034).

15. At a meeting on July 2, 1984, Gilbert Garcia reported to the partnership "on the most recent discussion" with FCC counsel Chester Naumowicz (Mission Ex. F, at 1). The minutes of the meeting state:

> "Naumowicz seemed pleased with the input from Gil but indicated that the Agreement must be clear that the limited partners have no control. It appeared that he may want to tighten the Agreement further to strengthen the General Partners control. The attorney's letter was mailed to the Partnership today from Washington. Gil expressed appreciation to the group for its efforts in meeting the Friday timeline for filing the Agreement."

Garcia first testified that he could not remember whether he had retained or spoken with FCC counsel (Tr. 20-24) but, later, conceded that he had dealt with FCC counsel "trying to find out how the limited partnership would apply" (Tr. 2092) and he remembers reporting to the group (Tr. 2093).

16. Garcia first testified that he had no recollection of having had any involvement with engineering matters on behalf of Coast (Tr. 2044). Ultimately, Garcia remembered that he "was asked" to call KEYT-TV about piggybacking on its tower because he had mentioned at a meeting that

he knew someone at KEYT-TV (Tr. 2046). Coast's minutes of the partnership meeting held on July 5, 1984, state that:

> "Gil Garcia indicated that although he had been promised a letter from KEYT engineer Goddard that it had not as yet been received. It was recommended that he contact Goddard to ascertain the delay."

(Mission Ex. G, at 2). Garcia did contact KEYT-TV (Tr. 2047) and, as a result, Coast received its tower site assurance.

17. Garcia testified that he had a role in introducing the general partners of Coast TV to "people that I know in the banking industry" (Tr. 2039). Garcia at first testified that he accompanied his wife to City Commerce Bank to introduce her to a vice-president there (Tr. 2039-40), but subsequently changed his testimony and stated that his wife knew the banker already and she had asked Garcia to go along (Tr. 2040).

18. After the formation of Coast TV, limited partners continued to attend meetings (Tr. 319), and participate in discussions (Tr. 321), and make and second motions (Tr. 325). Limited partner Al Pizano called a meeting for July 26, 1984, and "invited" all Coast partners to meet a woman who used to own a TV station in a nearby city (Tr. 324). Coast minutes for a July 2, 1984, meeting reflect that (a) limited partners participated in motions and voting, (b) limited partner Walter Loster presented a "treasurer's report," (c) two limited partners were to be involved to "develop the application," and (d) limited partner Al Pizano had scheduled a meeting with a Bank of America official on July 6, 1984 (Mission Ex. F at 1-2). Pizano attended the Bank of America meeting with limited partner George Castagnola (Tr. 2287). Pizano also participated in a meeting at Santa Barbara Bank and Trust with Castagnola (Tr. 2290).

19. Coast's minutes of a July 5, 1984, meeting reflect that (a) limited partners Ornelas and Pizano questioned limited partner Shirley Kennedy about "the rationale" of the applicant's programming proposals, (b) limited partner Pizano reported on a meeting with a Bank of America officer that was to be attended by three limited partners and by general partner Ruth Smith, (c) limited partner Pizano indicated that "Coast TV needed more financial strength," and (d) limited partner Lizarraga recommended and was "given the approval" to contact a Los Angeles banker (Mission Ex. G, at 1-3).

20. The Coast minutes of its July 11, 1984, meeting reflect that (a) Walter Loster submitted a "treasurer's report," (b) limited partner Ornelas recommended legal consultation regarding KEYT's site letter, (c) limited partner Walter Loster was urged to contact the Bank of Montecito, and (d) limited partner Shirley Kennedy reported "interesting information regarding broadcasting" (Mission Ex. H, at 1-2).

21. Limited partner James Smith accompanied his wifw to the Santa Barbara Bank & Trust to discuss a loan commitment letter for Coast (Tr. 583). Mr. Smith reviewed the bills from local counsel David St. John and recommended to the general partners that the bills be paid (Tr. 1958, Tr. 1975-6). Smith's wife became involved because Mr. Smith could not agree to be integrated as a full-time owner/manager at the proposed station (Tr. 1959).

22. The minutes of Coast's August 9, 1984, meeting reflect that (a) limited partners participated in motions and voting, (b) limited partner Tomas Castelo suggested the preparation of a "detailed report of paid bills," and (c) limited partner Pizano inquired whether the application would be strengthened "by a person with broadcasting background" (Mission Ex. J at 1-2.)

23. On August 5, 1985, the Coast limited partnership agreement was amended (Coast Ex 6, App. A at 4). The amended partnership agreement includes the restrictions on limited partner activities specified in Ownership Attribution, 58 RR 2d 604 (1985).

24. On February 4, 1986, Coast TV amended its application to report a redistribution of ownership pursuant to a recent capital call. The amendment was accepted by the presiding officer (see Order, FCC 86M-706, released February 2,1986). The ownership of Coast is now reported to be as follows:

Name of Each Partner	Interest	Ownership
Martha Correa	General Partner	12.996%
Patricia Montemayor	General Partner	8.740%
Ruth J. Smith	General Partner	12.996%
Estate of George V. Castagnola	Limited Partner	7.581%
Tomas A. Castelo	Limited Partner	14.679%
Gilbert Garcia	Limited Partner	7.581%
Shirley Kennedy	Limited Partner	7.581%
Walter Loster	Limited Partner	7.581%
Carlos Ornelas	Limited Partner	7.581%
Alberto P. Pizano	Limited Partner	5.096%
James David Smith	Limited Partner	7.581%

Mission Broadcasting Corporation

25. Mission is a California corporation whose articles of incorporation were filed July 3, 1984. On July 16, 1984, its offficers were:

Floyd Little ..... Chief Executive Officer/ President
Chris Carrera ..... Secretary
Payne Green ..... Chief Financial Officer
George Guzman ..... First Vice President
Joe DeLuna ..... Second Vice President
Mel Donalson ..... Third Vice President

26. Mr. Floyd Little testified that these Mission principals were at the time acting as "proposed shareholders and directors" (Mission Ex. 7A). Each of the six at the time had committed themselves to being a voting shareholder, officer, director and full-time manager at the proposed station. Each of them either submitted a check on July 16 or had promised to pay by July 23, 1984, the deadline for filing the FCC application.

27. Mr. Little signed Mission's application on July 18, 1984. Before signing the application, Little confirmed that the corporation had either received checks or had been assured that checks would be received by July 23, 1984, from each of the persons listed in Mission's July 1984 application. Litile had no doubt that the persons listed on Mission's application had committed themselves to be Mission stockholders (Mission Ex. 7A).

28. Mission held a meeting of its board of directors on September 5, 1984. Mr. Little testified that at that meeting, Joe DeLuna's written resignation as a director and voting stockholder was received: (Mission 7A).

That written resignation reads, in its entirety, as follows.

TO: The Board of Directors of Mission Broadcasting Corporation

NOTICE IS HEREBY GIVEN that I, the undersigned resign as Director and Second Vice-President of Mission Broadcasting corporation. My resignation is effective on September 5, 1984.

Dated: September 5, 1984

/s/ JOE DeLUNA
Director and Second Vice-President
Mission Broadcasting Corporation

29. Ms. Willie Rowan, a new voting stockholder, was elected as a Mission director. At that meeting, and also on the following day, Mission received checks from stockholders for the purchase of additional stock. Floyd Little testified that when he signed Mission's "B" cut-off amendment on September 6, 1984, Mission had received checks, or personal assurances that checks were being sent, by all of the persons listed in Mission's "B" cut-off amendment, and that each of the 31 persons listed in the amendment, except for 4, had paid for his or her stock by September 6, 1984. Three persons paid on September 7, 1984. Ms. Willie Rowan, who paid for 500 of her 600 shares by two checks--both dated September 5, 1984--submitted a third check (for 100 shares) dated September 10, 1984.

30. On the "B" cut-off date, Mission had the following structure:

Name	Office Held	Director	% of Ownership
Floyd Little	President and Chief Executive	Yes	5.95%VS [29.4%][6]
George Guzman	First Vice President	Yes	2.38%VS [11.8%][6]
Willie M. Rowan	Second Vice President	Yes	7.14%VS [35.3%][6]
Christopher P. Carrera	Secretary	Yes	1.19%VS [5.9%][6]
Payne Green	Chief Financial Officer	Yes	2.38%VS [11.8%][6]
Mel Donalson	Third Vice President	Yes	1.19%VS [5.9%][6]
Joe DeLuna	None	No	2.38% NVS
William Graziano	None	No	5.95%
Michael Woods	None	No	2.38% NVS
Thomas O. Richard	None	No	7.14% NVS
Zachary Miller	None	No	1.19% NVS
Robert Rickard	None	No	4.76% NVS
Robert M. Jaffe	None	No	7.76% NVS
Michael J. Kelly	None	No	1.19% NVS
Lindsay Wineberg	None	No	1.19% NVS
James B. Rickard	None	No	1.19% NVS
Dennis F. Rickard	None	No	1.19% NVS
Betty Green	None	No	2.38% NVS
Joyce Little	None	No	5.95% NVS
Kathleen N. Guzman	None	No	1.19% NVS
Susan Carrera	None	No	1.19% NVS
John Story	None	No	3.57% NVS
Hal Williams, Sr.	None	No	5.95% NVS
Bonnie O'Brien	None	No	1.19% NVS
James Campbell, Jr.	None	No	5.95% NVS
Mrs. John T. Rickard	None	No	2.38% NVS
John Rickard and Nikki Rickard[7]	None	No	2.38% NVS
Dennis Amerio Corradi	None	No	3.57% NVS
Mike Sanchez	None	No	8.33% NVS
Ed Vigil	None	No	1.19% NVS
Marla Daily	None	No	1.19% NVS

31. On September 12, 1984, 5 days after the "B" date, the Mission board of directors formally "accepted" the 31 investors, including the above listed "voting stockholders" who previously had purchased stock. This action was taken by the board as a formality suggested by local counsel (Mission Ex. 7A).

32. Mission proposes to integrate all of its voting stockholders. Mission has not proposed to integrate Joe DeLuna, so it is important to determine whether DeLuna's stock had been actually transformed from voting to non-voting stock by the "B" cut-off date.

33. At the board of directors meeting of September 5, 1984, Mr. DeLuna reported that he could not devote full time to the station, thus becoming ineligible to hold voting stock, and "resigned" (Tr. 944-5). DeLuna's written resignation was submitted to the board, and that written resignation was as Director and Second Vice President of Mission (Solar Ex. I). The writing makes no reference to any change in DeLuna's status as a voting stockholder. Nevertheless, in its "B" date amendment, Mission reported Mr. DeLuna as a non-voting stockholder. Subsequently, after the "B" cut-off date, the board of directors "accepted" him as a non-voting stockholder (Solar Ex. D), and still later issued him non-voting stock.

34. In its "B" date amendment, Mission reported the existence of one new voting stockholder with 35.3% of the voting stock and 7.14% of its total equity, and 14 new

non-voting stockholders with 47.43% of total equity. That amendment gives no information with respect to possible media interests of the new stockholders.

35. Mr. Floyd Little is proposed to be integrated into the day-to-day management of the station as the full-time (40 hours per week) General Manager (Mission Ex. 2 at 6). Little would oversee the sales department, make certain the station was in compliance with FCC rules and other rules, and would solicit network affiliation (Tr. 1016).

36. As the general manager, he will not have a "boss," and none of the five other participating owners would report to him (Tr. 1013-1015). His subordinates are to be ". . . people that I would be supervising, secretaries, whatever assistants I might need." (Tr. 1013). Mr. Little, and the other participating owners, are accountable to the board of directors. Little's proposed method of dealing with any disagreement he might have with another manager, such as the station manager, is to try to "sway" the other manager. Failing that, he will lobby the other managers to help him "sway" the recalcitrant manager. If the managers are unsuccessful in reaching an agreement on a matter, then they will take the matter to the board of directors for resolution (Tr. 1015).

37. Mr. Little is a Black male and has been a resident of Santa Barbara since 1981. He graduated from Syracuse University with a B.A. in history in 1967. In 1975, he graduated from the College of Law, University of Denver, with a Masters degree in judicial administration. He has been involved in business management since 1976. From 1979-1985, he was general manager at several Ford Motor Corporation dealerships. From 1981-1985, Little was general manager of Santa Barbara Lincoln Mercury, Inc. From 1976 through 1977, Little was employed by NBC Sports as a television sports announcer. From 1976-77, Little was an announcer for KBTV-TV, Denver, for the Denver Broncos' pre-season games.

38. From 1982-1983, Little was a member of the Advisory Board of the Santa Barbara Traditions Committee. He has attended meetings, been a guest speaker at, and is a candidate for membership in the Santa Barbara Rotary Club. Since 1984, Little has been a member of the following Santa Barbara civic organizations: (a) Advisory Board, Retirement Housing Foundation for Senior Citizens; (b) Advisory Board, Afro-American Community Services; (c) Assistant Coach, University of Santa Barbara Football Team. Since 1982, Little has been a volunteer (unpaid) guest lecturer on "Small Business" at the Santa Barbara Community College. Since 1982, he has been a volunteer (unpaid) guest lecturer at the Santa Barbara Athletic Roundtable. Since 1983, he has been a volunteer (unpaid) guest lecturer on Small Business Challenges at the University of California at Santa Barbara. Since 1981, he has been a member of the Santa Barbara Chamber of Commerce.

39. Melvin B. Donalson is proposed to be integrated into the day-to-day management of the station as the full-time (40 hours per week) Program Director (Mission Ex. 3). Donalson will generally be in charge of acquiring, scheduling and managing the on-air programming (Tr. 600; 603).

40. Mr. Donalson's understanding is that each of Mission's six managers will have equal power and that he, as the program director, will have the final say on programming matters, unless the board of directors overrules his decision (Tr. 660; 661). The station will be run by a "coalition of managers," but there will be no one above him in terms of a "boss," as far as programming is concerned (Tr. 602; 603). He believes that the coalition of managers will be in charge of setting the day-to-day policy of the station (Tr. 603; 604).

41. Mr. Donalson is a Black male and has been a resident of Santa Barbara and its suburb, Goleta, since 1980 (Mission Ex. 3). He maintains a second residence in Los Angeles. Donalson received a B.A. degree in 1973 from Bates College (Maine). He received an M.A. degree in American studies in 1975 from the University of Iowa. In 1981, Mr. Donalson received a Ph.D. from Brown University, where he studied American film, film history and film criticism.

42. Donalson was a radio announcer at station WRBC(FM), Lewiston, Maine, from 1969 to 1971. During the years 1969 to 1978, he took one film course at Bates college, four film courses at the University of Iowa, and three film courses at Brown University. In 1979, he assisted in the production of "Job Core," a television commercial made in Boston. From 1980-84, he was a lecturer in Film Studies at the Unviersity of California at Santa Barbara. From 1982-83, Donalson was a television talk show interviewer at the University. In 1979, at Brown University, he wrote and produced a short film documentary, "Going Home." In 1978, at Brown University, he wrote and directed a short film documentary, "Generations From Georgia." In 1975, while at the University of Iowa, he wrote and produced a short film documentary, "Karateka." Since 1983, he has been a freelance script analyst for NBC, New World Pictures, Rainbow Productions and D/P Associates. Since February 1984, he has bee" a consultant for several film production companies.

43. Since 1984, Donalson has been a member of the NAACP, Santa Barbara chapter. Since 1981, he has been a volunteer (unpaid) instructor at the Wu Shu Martial Arts Academy in Santa Barbara. Since 1983, he has been a volunteer (unpaid) speaker at the Black Literature Workshop of the Santa Barbara Public Library. From 1982-1984, he was a volunteer (unpaid) faculty speaker for the Equal Opportunity Program-Outreach of the University of California at Santa Barbara. Since 1981, he has been a volunteer (unpaid) guest speaker at the George Washington Club, Santa Barbara. In 1982, he was selected to be a member of the W. E. DuBois Awards Committee at the University of California at Santa Barbara.

44. George G. Guzman is proposed to be integrated into the day-to-day management of the station as the full-time (40 hours per week) Director of Minority Affairs (Mission Ex. 4). Guzman is a Hispanic male and has lived in Santa Barbara since his birth in 1920. He has been the co-owner of a Santa Barbara clothing business since 1967.

45. From 1969 to 1973, Guzman served as a field representative of Santa Barbara mayor Gerald Firestone. He served on the Santa Barbara Citizens Goals Committee from 1968 to 1970; the Santa Barbara HUD Advisory Committee from 1970 to 1972; the Santa Barbara High School District Citizens Advisory Committee from 1973 to 1975; the Santa Barbara Tri-County Senior Citizens Advisory Committee, member-at-large, from 1972 to 1975; the Board of Directors of Santa Barbara Retail Clerks Association from 1954 to 1958; the Santa Barbara Mental Health Association from 1975 to 1977; was president of the Legal Defense Center, Inc., of Santa Barbara from 1970 to 1972; and president of the Santa Barbara Councilo de la Raza from 1967 to 1968. He was a candidate for mayor of the city of Santa Barbara in 1973. He has been a member of

the Santa Barbara chapter of the National Organization of Foresters since 1954. Since January 1985, he has participated in the Santa Barbara High School Speakers Program.

46. Christopher P. Carrera is proposed as the station's full-time (40 hours per week) Director of Public Affairs (Mission Ex. 5). His responsiblities will include finding out what issues confront the community and then addressing them through the station's programming (Tr. 684). Carrera will be responsible for gathering the information which will enable the station to make the appropriate choices in its programming (Tr. 864). He characterized his role as ". . . work[ing] with the other managers at our station in dealing with the issues of a community which we live in, dealing with the community to find out how we can best serve this community" (Tr. 685). He will address the selected community issues by suggesting programming to the program director, as well as to the other managers as a group.

47. Carrera sees the overall policy for Mission and for the station as being set by the group of the six managers together. He will report on his activities to the station manager and, from time-to-time, to the group of six managers (Tr. 687-688).

48. Carrera is a Hispanic male and has resided in Santa Barbara or its suburb Goleta since 1955 (Mision Ex. 5). He received a B.A. degree from the University of California at Santa Barbara in 1975. He has a Bilingual Teaching Certificate.

49. Since 1983, Carrera has been tennis coach for the Santa Barbara Youth Tennis League. Since 1984, he has been vice president of the Tennis Patrons Association of Santa Barbara. Since 1984, he has been assistant coach for the Santa Barbara Boys Club baseball team. Since 1984, he has been coach for the American Youth Soccer Organization team in Santa Barbara. During the 1985 school year, he served as La Patera school representative to the District Curriculum Council and District representative to the Advisory Committee of the Instructional Service Council For Santa Barbara County and a member of the County's "SHARE" program, county-wide curriculum sharing program. He is a member of the Advisory Committee of Impact, a Santa Barbara educational program sponsored nationally by Exxon. Since 1983, he has been a member of the Santa Barbara Chapter of the National Education Association.

50. Payne K. Greene is proposed to be integrated into the day-to-day management of the station as the full-time (40 hours per week) Operations Director/Community Relations Director (Mission Ex. 3). As Operations Director, he will be in charge of production and engineering on a day-to-day basis (Tr. 904). He will supervise the chief engineer (Tr. 919).

51. Mr. Green's responsibility and authority as Community Relations Director will involve "making sure that the community is aware that we have a community function which is providing them with proper air time for advertise- ments, commercials, awareness of programs, etc." (Tr. 905). He plans to rely on his personal knowledge to identify the various community groups (Tr. 921-922).

52. Green is a Black male and has been a resident of Santa Barbara since his birth in 1932 (Mission Ex. 6). He obtained a B.A. degree from San Jose State College in 1958.

53. Since 1984, Green has been a member of the Santa Barbara Crime Council. He is a longtime member of the A.M.E. Church in Santa Barbara. From September 1970 to June 1972, Mr. Green served as volunteer student counselor at Santa Barbara Junior High School, helping students and staff members with school problems. During the same time period, he started the "Youth and the Law Program" at Santa Barbara High School. Since 1969, he has given presentations concerning drug abuse in all Santa Barbara schools. Since 1970, he has made similar presentations on drug abuse for the Boy and Girl Scout organizations in Santa Barbara. Since 1970 he has given numerous presentations to the Optimist Club of Santa Barbara, Lions Club, and Kiwanis Club of Santa Barbara on preventive precaution and shoplifting laws.

54. Willie M. Rowan is proposed to be integrated into the day-to-day management of the station as the full-time (40 hours per week) Station Manager (Mission Ex. 7). She will have responsibility for day-to-day functioning of the station (Tr. 817), and will supervise the station's personnel director (Tr. 817; 803).

55. Rowan believes that as station manager, she will have "functional" and "administrative" duties in her day-to-day management of the office and the station (Tr. 802). She will not report to the general manager or to anyone else (Tr. 820-21). She stated that the board of directors will make the fundamental decisions about the broad overall policies of the station (Tr. 802). She does not believe she will have a "boss," but foresees possible staff meetings, weekly or as necessary, to discuss problem areas (Tr. 820-21).

56. Rowan is a Black female who has been a resident of Santa Barbara since 1957. She earned a B.A. degree in Economics from the University of California at Santa Barbara in 1982. Since 1974, she has been the accounting manager for the Santa Barbara Museum of Art. 57. Since 1964, Ms. Rowan has been a member of the executive committee of the Santa Barbara chapter of NAACP. She has been both a member and treasurer of the George Washington Carver Scholarship Club of Santa Barbara since 1979. Since 1978, she has been a volunteer for the Afro-American Community Services of Santa Barbara. In 1978, she became a board member and treasurer of Afro-American Services. She has been a board member of the Santa Barbara Chapter, Planned Parenthood, Inc., since 1983, and a member of its Budget and Finance Committee since 1983. She has been vice chairperson of the Executive Committee of Work, Incorporated, since 1983. From 1966 to 1978, she did volunteer work with the South Coast Special Olympics in Santa Barbara County. Since 1970, she has been a member of the Advisory Board of the City of Santa Barbara Recreation Committee for the Developmental Disabled. She has been a member of the St. Paul A.M.E Church in Santa Barbara since 1957. In 1982, she served on the Santa Barbara School District Budget Study Committee.

Solar Television, Inc.

58. Solar Television, Inc. is a corporation organized under the law of the State of California. Solar's application was originally filed by Eugene E. Hugeuz, Suzanne Manriquez and Kenneth E. Hinton d/b/a Mission Broadcast, with each of the three individuals holding a 33-1/3% interest in the unincorporated association. By amendment of February 20, 1985, the three owners of Mission Broadcast reconstituted the applicant as the newly incorporated

Solar Televison, Inc., in which the owners are equal holders of all issued voting stock. They are also the corporation's sole officers and directors (Solar Ex. 1).

59. Neither Solar, nor its present stockholders, have any ownership interest in any medium of mass communications. Suzanne Manriquez is a member of the board of directors of the permitee of noncommercial, educational radio station KSTX, San Antonio, Texas. She has committed herself to resign from that position in the event of a grant of Solar's application (Solar Ex. 2).

60. Eugene E. Huguez is a Chicano United States citizen who has resided in Santa Barbara since January of 1985. With three brief exceptions to be stated, Mr. Huguez has lived continuously within the city grade contour of the proposed station for more than a decade, from March 1975 to the present. The exceptions are from June 1975 to September 1975; from June 1978 to September 1978; and during travel overseas from October 1984 to December 1984. Huguez lived for six years within the corporate limits of Santa Barbara, from September 1978 to September 1984 (Solar Ex. 3, para. 1).

61. Huguez holds a B.A. degree from the University of California, Santa Barbara (1980). He received the "University Service Award" for excellence in community service and was honored by the Chicano Studies Department as its "Outstanding Graduate" in 1980.

62. In the Fall of 1972, Huguez began training as an announcer at KELA, an "in house" station at East Los Angeles Community College. He was promoted to Station Manager and became the President of the organization, 1973-1974. In March 1975, he began working at KCSB(FM), Santa Barbara, licensed to the Regents of the University of California. He hosted a regular three-hour weekly music program and worked as a secretary for the station's administration. From 1976 to 1977, Huguez was the station's Publicity Director and, later, its Public Affairs' Director. In the Spring of 1979, Huguez became the General Manager of KCSB, and served in that position until the Spring of 1980.

63. Huguez has been an on-air host at KTMS(FM) (Summer 1975); an engineer and newscaster at KDB (AM-FM); and a disc jockey at KTYD(FM), parttime, from 1979 to 1981. *Id.*

64. From 1978 to 1984, Huguez served as coordinator for Radio Chicano Public Affairs, which produced weekly programs for KCSB(FM). In May of 1984, he was producer for Fiesta de la Communidad, a public theatrical performance by Teatro de la Espernaza in Santa Barbara (Solar Ex. 3, para 4).

65. Huguez is proposed as the full-time General Manager of the station (a minimum of 40 hours per week). His duties will include ensuring compliance with FCC Rules, establishing station policies and procedures, and representing the station in the community. The Chief Engineer and/or Technical Director will report to the General Manager (*see* Tr.1527-1529).

66. Kenneth E. Hinton is a Black United States citizen. His current residence is 6689 El Colegia #51, Goleta, California 93017, within the city grade contour of the proposed station. Hinton has lived in Goleta for nearly five years, since September 1, 1981 (Solar Ex. 4, p. 1).

67. Hinton's current employment is as Senior Producer/Director, Learning Resources, Television Services, at the University of California, Santa Barbara. He produces and directs educational TV programs for classroom use and cablecast over Educational Access, Channel 21, Santa Barbara. He develops budgets, writes scripts, and directs talent and crew. He had a paid position as Production Director for KCBS(FM), licensed to the Regents of the University of California, from September to December 1984. He provided the same service as a volunteer acting production director, until March 1, 1985. Currently, Hinton is producer for a regularly-scheduled weekly series of local cablecasts featuring the basketball coach at UCSB: "The Jerry Pimm Show." Hinton made a promise at the "B" cut-off to resign his position as Senior Producer/Director in the event that Solar Television, Inc.'s, application is granted (Solar Ex. 4, para. 2, Tr. 1428).

68. From January 1975 until July 1977, Hinton was employed as an Engineer's Assistant in the Media Center, Orange Coast College, Costa Mesa, California. He assisted with installation of equipment for a three-camera color TV studio and acted as engineer, director, technical director, floor manager, lighting director, audio technician, videotape editor, and camera operator. From September 1979 until February 1980, he held an internship as Production Assistant for the News Director at KOCE-TV, a public television station in Huntington Beach, California. He assisted in the production of "Newscheck," an evening TV news program, and edited scripts, operated camera, and operated a teleprompter. From August 1977 until August of 1981, he was Senior Producer-Director and Manager of Media Services for the Medical Center at the University of California, Irvine. In that position he produced, directed, and supervised development of TV programs related to the curriculum. He was responsible for production quality, budgets, personnel, physical planning, and service (Solar Ex. 4, para 3).

69. Hinton has had involvement with non-commercial KCSB(FM). Since June of 1984, he has been volunteer host to "The Freak Show," a regularly scheduled mini-history of popular black music. Since July of 1984, he has volunteered as an engineer on "Black Kaleidescope," a regularly scheduled public affairs program (Solar Ex. 4, para 4).

70. Hinton is proposed as the full-time Executive Operations Manager (a minimum of 40 hours per week). If the application is granted, he intends to move to the city of Santa Barbara. His duties will include primary oversight of program acquisition, production, and scheduling. Directors of news, public affairs, and traffic departments will report to the operations manager. During the construction phase, his duties also will include supervision of studio site selection, studio design and installation, and studio equipment selection (Solar Ex. 4, para 5, and see Tr. 1459-1460). At the hearing, Hinton was asked whether he would be the program director. "No . . . I would supervise the program director" (Tr. 1458). He testified that each manager would hire his or her own staff, under the ultimate oversight of the general manager (Tr. 1458-1459).

71. Suzanne Manriquez is a Chicana United States citizen. Her residence is at 334 N. Atlantic Blvd. #207, Alhambra, California (Solar Ex. 5, para. 1). If Solar's application is granted, she intends to move to the city of Santa Barbara (Solar Ex. 5, para 6).

72. Manriquez lived with her parents in Carpinteria, California, from her birth in 1952 until September of 1970. For a period of 26 years, from 1952 until 1978, her residence was inside the city grade contour of the proposed station.[8]

73. Manriquez' current employment is as Executive Director of the California Chicano News Media Association, a professional association of journalists, affiliated with the

University of Southern California School of Journalism. She supervises a permanent staff of three other employees. Manriquez assumed her current position on January 2, 1985 (Solar Ex. 5, para 3). She made a promise at the "B" cut-off to resign any other full-time employment if Solar Television, Inc.'s, application is granted, and she understands that this promise applies to her current position (Solar Ex. 5, para 3).

74. Manriquez began work at KUBO, a non-commerical FM station in Salinas, California, in January 1981. She started as a promotions coordinator, was promoted to Assistant General Manager in August 1981, and became the General Manager in March 1982. She held that position until February 1984. As general manager, Manriquez was ultimately responsible for a staff of 90 persons (Tr. 1350).

75. From 1978 to 1980, Manriquez was the Director of Public Affairs for the National Association of Farmworker Organizations in Washington, D.C., where her responsiblity was promoting the Association's issues to the greater Washington, D.C., media. She conducted press conferences, prepared press releases, edited publications, and organized publicity campaigns. In that position, she was a member of the National Press Club (Solar Ex. 5).

76. Manriquez' civic activities within the city limits of Santa Barbara include service to La Casa de la Raza, a community social service and cultural center in Santa Barbara. She was a volunteer, fundraiser, public relations person, and board member for one year during 1971 to 1974. She served on the community advisory board of the Community Health Task Force in Santa Barbara from 1975 to 1976. She was a deputy voter registrar in Santa Barbara in 1971 and 1972. In 1975 and 1976, Manriquez served as president of the organizing committee for AFSCME Local 673, during its effort to unionize non-faculty employees of the University of California at Santa Barbara.

77. Manriquez is proposed as the full-time Executive Business Manager of the station (a minimum of 40 hours per week). Her duties will include budgeting, financial planning and capitalization; and supervision of persons responsible for sales, accounting, payroll, publicity, and personnel. She will recruit, train and supervise an Assistant Business Manager who will be responsible for payroll records, billing records, tax forms, and the bookkeeper.

Comparative Coverage

78. Table I depicts the level of service to areas and populations within each applicant's Grade B contour as predicted using standard methods (Joint Ex. 1).

TABLE I

Level of TV Service to be Provided	Areas and Populations Proposed to be Served by Each Applicant					
	Coast		Mission		Solar	
Level	Pop.	Area	Pop.	Area	Pop.	Area
0	-	-	-	-	-	-
1	-	-	-	-	-	-
2	2,225	148	2,225	148	2,225	148
3	375,765	3,658	375,605	3,624	369,045	3,285
4	20,826	1,502	20,121	1,438	17,550	1,131
5 or more	423,014	2,382	413,294	2,337	382,794	1,760
Total	821,830	7,690	811,245	7,547	771,614	6,324

79. Solar introduced a supplemental showing under Section 73.313(e) of the Commission's Rules (Solar Exhs. ENG-1 and ENG-2). It purports to demonstrate that terrain will limit the coverage to be expected from standard prediction methods and includes areas and populations proposed to be served by each applicant, as predicted by methodology which accounts for terrain shielding. Table II depicts such data (Solar Ex. ENG-2).

TABLE II

Level of TV Service to be Provided	Areas and Populations Proposed to be Served by Each Applicant					
	Coast		Mission		Solar	
Level	Pop.	Area	Pop.	Area	Pop.	Area
0	-	-	-	-	-	-
1	-	-	-	-	-	-
2	2,357	132	2,357	132	2,357	132
3	324,082	1,095	324,082	1,905	322,918	1,844
4	5,528	38	5,528	38	5,528	38
5 or more	309,644	193	308,874	191	306,912	186
Total	641,611	2,268	640,841	2,266	637,715	2,200

Conclusions of Law

Mission's Ownership Representation

80. When Mission filed its application on July 23, 1984, it had no formal stockholders or stock subscribers, but each of the persons listed in the application as a stockholder had either paid for his stock, or had committed himself to pay for that stock. Giving effect to the manifested intentions of those "stockholders," there is no basis for concluding that Mission misrepresented or lacked candor in stating its ownership in the application as originally filed.

81. Joe De Luna was one of those principals who had either paid for his stock or had promised to pay; DeLuna was shown in the application as a holder of voting stock. Mission's "B" date amendment showed DeLuna to be the holder of *non - voting* stock only. This transformation in the nature of DeLuna's interest is not clearly shown by any formal corporate action. As earlier seen, DeLuna's written "resignation," submitted to Mission's board of directors on September 5, 1984, had explicit reference to DeLuna's positions as "Director and Second Vice President of Mission Broadcasting Corporation." That particular writing made no reference to any change in DeLuna's status as a voting stockholder. As a result, both Coast and

Solar argue that the facts which enabled Mission to list DeLuna as a voting stockholder when the application was filed, still obtained at the time of the "B" date amendment:

> "Absent appropriate affirmative action on the part of [DeLuna] and on the part of Mission prior to the 'B' cut-off date, [his] status as [a] voting [stockholder] for comparative purposes could not be altered. Thus, with respect to the 'A' date voting stockholder Joe DeLuna, no appropriate affirmative action was actually taken by the 'B date."

Both Coast and Solar argue that for purposes of this proceeding, Joe DeLuna must be considered to be the holder of 200 shares of voting stock; and, since DeLuna is not proposed to be integrated into the management and operation of the proposed station, Mission's assertion that all of its voting stockholders as of the "B" date will be fully integrated, is simply wrong.

82. The argument overlooks a critical change in the facts, a change that was manifested prior to the "B" date. At the September 5, 1984, meeting of Mission's board of directors, DeLuna informed the board that he would be unable to devote full-time to the station. Mission had organized itself in such a way that a commitment to be a full-time manager was a prerequisite to the holding of the corporation's voting stock (Tr. 945). This meant that on September 5, 1984, DeLuna became ineligible to continue as a holder of the corporation's voting stock.

83. The lack of formal corporate action at the time notwithstanding, DeLuna's manifested intention cannot be ignored. Giving effect to that intention, it is not correct to say, as Coast and Solar do, that, "with respect to the 'A' date voting stockholder Joe DeLuna, no appropriate affirmative action was actually taken by the 'B' date." The reasons are that, (1) before the "B" date, DeLuna had changed his mind about continuing as an integrated holder of voting stock and (2) that new intention was made manifest by DeLuna informing Mission's board of directors on September 5, 1984, of his determination to continue as a non-integrated, non-manager stockholder and, concomitantly, his determination to relinquish his voting stock.

84. DeLuna's written "resignation," submitted to Mission's board of directors on September 5, 1984, unsurprisingly gave no suggestion of a change in DeLuna's status as a voting stockholder. The "resignation" was clearly directed to corporate positions held, i.e., Director, Second Vice President, and "voting stockholder" is not usually viewed as a corporate "position" from which one "resigns." In summary of this matter, De Luna's written "resignation" is in no way inconsistent with the notion that, as concluded here, DeLuna relinquished his interest as a holder of voting stock on September 5, 1984, before the "B" cut-off date in this proceeding. It follows that Mission's "B date amendment, showing DeLuna as a holder of non-voting stock, was proper, and carried no suggestion of misrepresentation or lack of candor. The special issue is resolved in favor of Mission Broadcasting Corporation.

Comparative Analysis

Coast TV

85. Mission charges, without elaboration, that "the demonstrable non-passivity of Coast's limited partners requires that its ownership be recognized as a sham," citing *KIST Corp.*, 58 RR 2d 1483. Alternatively, Mission argues that Coast's limited partners repeatedly exercised *de facto* control long after they became allegedly "passive," and, therefore, the equity interests of Coast's limited partners are attributable and the maximum integration credit which Coast can claim is the 34% presently held by its three owners who are proposed to be integrated. For this latter proposition, Mission relies upon *Signal Ministries, Inc.*, FCC 86R-50 (Rev. Bd.), released August 18, 1986.

86. *KIST, supra*, is plainly distinguishable. In that case, the Commission gave as its reasons for finding the structure of the applicant to be a sham: the incredible circumstance that a 95% interest in the applicant would be given without payment to a near stranger[9]; the 95% stockholder had played virtually no part in the preparation of the application [10]; the 95% stockholder had no involvement in obtaining financing commitments.[11]; the 95% stockholder had contributed no capital and incurred no financial obligations [12]; there was no written agreement governing how authority would be exercised [13]; and the 5% stockholder had dominated the affairs of the corporation and ignored the 95% stockholder.[14]

87. *Signal Ministries, supra* , too, is distinguishable. There, the Review Board relied upon the "totality of the circumstances," which included both past and proposed future participation by the non-voting stockholders. The non-voting stockholders were the impetus behind the formation of the group and had the primary role in organizing the entity, communicating with counsel, and representing the corporation. They participated in all discussions of substantive corporate matters, and were proposed, looking to the future, to hold the positions of station manager, program director, and marketing director at the proposed station.

88. All three of Coast's general partners will be integrated at least 40 hours per week into management positions at the proposed station. Coast is entitled to 100% quantitative integration credit.

89. Each of Coast's integrated owners is a member of an ethnic minority, and is also a female, substantially enhancing the integration proposal on each of those accounts. Substantial enhancement of the proposal also results from the fact that each of those owners is a long term resident of Santa Barbara. Coast receives further enhancement of its integration proposal on account of the extensive record of civic participation by its general partners in the proposed community of license. Finally, Coast's proposal is slightly enhanced by the broadcast experience of Patricia Montemayor.

90. Neither Coast nor any of its principals has any interest in any medium of mass communications.

Mission Broadcasting Corporation

91. Mission is entitled to 100% quantitative integration credit for its proposal to integrate each of its six voting shareholders, on a full-time basis, into the management of the proposed station. The integration proposal is substantially enhanced by the minority status of each of the integrated principals, and by their local residence. The proposal is further enhanced by the record of civic participation on the part of each of the voting stockholders and, to a minor extent, by the broadcast experience of Melvin Donalson.

92. In its application as filed on July 23, 1984, Mission indicated that neither the corporation nor any of its shareholders held any interest in any medium of mass commu-

nications. In its "B" date amendment, Mission showed the addition of 14 non-voting shareholders and one new voting shareholder, but made no representation concerning the possible media holdings of any of these individuals. Official notice is taken of Mission's July 23, 1984, application to support the conclusion that, as of that time, neither Mission nor any of its then stockholders had any media interests. Testimonial evidence appears to support the conclusion also that none of these "B" date stockholders hold any cognizable interest in any medium of mass communications. Specifically, Mission president Floyd Little testified that prior to Mission s submission of its "B" cut-off amendment, every stockholder had signed a stock subscription agreement (Tr. 2458), and had been required to complete an attachment to the subscription agreement regarding any media interests that they held so that Mission could assure itself that its owners had no such media interests (Tr. 1007). No such interests were revealed, and the inference accepted here is that none of the "B" date stockholders hold any media interests. It is concluded that neither Mission, nor any of its shareholders, have any cognizable interest in any medium of mass communications.

Solar Television, Inc.

93. Solar is entitled to 100% quantitative credit for its proposal to integrate its three principals, on a full-time basis, into the management of the proposed station. The proposal is substantially enhanced by the minority status of each of Solar's principals.

94. Further enhancement results from the local residence of the Solar principals. Huguez is presently a resident of Santa Barbara; before he resided for 10 years within the city grade contour of Solar's proposed station(intermittently in Santa Barbara itself). Hinton has resided for the past 5 years in Goleta, California, within the station's proposed city-grade contour and will move to Santa Barbara if Solar's application is granted. Manriquez was formerly a long-time resident within the city-grade contour (and, briefly, in Santa Barbara itself), and will move to Santa Barbara in the event Solar prevails in this proceeding.

95. Solar receives some enhancement of its integration proposal for Manriquez' involvement in civic activities in Santa Barbara a decade ago and very slight enhancement for Huguez' part in the production of a theatrical performance, and his work with Radio Chicano Public Affairs. Finally, Solar receives minor enhancement of the proposal due to the past broadcast experience of each of its three principals.

Comparative Coverage

96. Standard prediction methods show that all proposals would provide an identical second television service. There are very slight differences in the predictions for third service and for total service areas and populations, with Coast ranking first, Mission second and Solar third, in both respects. The differences are so slight, however, especially when viewed in the context of the total service area, that they are decisionally insignificant. *See Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 421 (Rev. Bd. 1984).

97. A supplemental showing taking terrain shielding into account suggests that the differences may actually be smaller than predicted using standard methods. The ranking of the applicants would remain the same.

98. It is concluded that, notwithstanding the prediction method used, there are no cognizable differences in coverage among the applicants and none warrants a comparative preference.

Ultimate Conclusions

99. All of the owners whom each of the applicants proposes to integrate into the operation of its station are members of a racial or ethnic minority identified by Commission as meeting enhancement credit. No applicant receives a preference for minority integration.

100. Each applicant is credited with broadcast experience by one or more of its principals. The minor differences among them on this score, however, are insufficient to warrant the granting of a preference to any one of the applicants.

101. Coast's three general partners, Mission's six voting stockholders, and Solar's three stockholders are or have been residents of the Santa Barbara or the Santa Barbara area for several years. Solar's Manriquez is the only principal not currently resident within the service area, but she promises to return to Santa Barbara if Solar receives a grant.

102. Civic activities are not counted as an independent enhancement factor, but are "evaluated as 'a part' of a principal local background, " *Loraine Community Broadcasting Co.*, 13 RR 2d 382, at fn. 4 (Rev. Bd. 1968). Each of Coast's general partners, and each of Mission's voting stockholders, shows an impressive record of participation in civic activities. For Solar, only Manriquez has a substantial record in this regard. Coast and Mission are viewed as approximately equal on the matter of civic participation and, hence, on the local residence factor; both are ahead of Solar.

103. Mission's 35.2% stockholder Rowan is a female; Solar's one-third owner Manriquez is a female, and Coast's three general partners are all females. Thus, Coast's integration proposal is qualitatively enhanced to a greater degree than that of Mission and that of Solar, making Coast the clear winner in this close comparative contest.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276[15] of the Rules, the application of Coast TV IS GRANTED, and the applications of Mission Broadcasting Corporation and Solar Telelvision, Inc., ARE DENIED.

Edward Luton
Administrative Law Judge
Federal Communications Commission

FOOTNOTES

[1] See *Order* released March 27, 1986 (FCC 85M-1279).

[2] The air hazard issue against the applicants remaining in hearing was favorably resolved by interlocutory orders: Mission by *Order* released December 10, 1984 (FCC 84M-5120); Coast by *Order* released January 15, 1985 (FCC 85M-130); and Solar by *Order* released July 17, 1985 (FCC 85M-2811).

[3] The *Hearing Designation Order* specified that the applicants' coverage would be considered under the comparative issue.

[4] The percentages of ownership interest listed in the text for each partner are contained in Coast Exhibit No. 1, and are accurate as of the "B" cut-off date. However, because of redistribution of equity subsequent to the "B" date, the listed percentages of ownership do not total 100%.

[5] On March 13, 1986, Coast tendered an amendment to its application reporting Mr. Castagnola's death, and on June 26, 1986, reported that the co-executors of his estate are Rena G. Castagnola and Santa Barbara Bank & Trust.

[6] Percentage of voting stock held. The figure immediately above reflects the percentage of equity in the corporation.

[7] Held as joint tenants.

[8] She lived within the corporate limits of the City of Santa Barbara from the beginning of 1973 until September of that year; from June of 1974 until June of 1975; and from December of 1976 until August of 1977.

[9] None of Coast's partners received their equity as a gift.

[10] Coast's general partners participated fully in the preparation of the application.

[11] Coast's general partners obtained the financing commitments.

[12] Coast's general partners have contributed *pro rata* for their equity, and are solely responsible for Coast's financial obligations.

[13] Coast is governed by its limited partnership agreement.

[14] So far as appears, the general partners have exlusively controlled the affairs of the corporation since its formation.

[15] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

RUTH PAYNE CARMEN MM DOCKET NO. 84-816

File No. BPCT-840402KW

Jeanetta M. Pollard d/b/a MM DOCKET NO. 84-817
DOVE BROADCASTING COMPANY

File No. BPCT-840530KE

For Construction Permit for
New Television Station,
Nashville, Tennessee

Appearances

Laurence Singer on behalf of Ruth Payne Carmen; and *Rudolph L. Ennis* and *Robert S. Stone* on behalf of Dove Broadcasting Company.

DECISION

Adopted: September 19, 1986; Released: October 1, 1986.

By the Review Board: MARINO (CHAIRMAN), BLUMENTHAL, and ESBENSEN
Board Chairman MARINO:

1. A trial-type comparative hearing to select the best broadcaster for a new television station in Nashville, Tennessee ultimately resulted in the selection of Ruth Payne Carmen as the "preferred applicant." See Initial Decision (I.D.) of Administrative Law Judge Harrison, (ALJ), FCC 86D-24, released March 27, 1986, Conclusion 9. Carmen was preferred because her longtime residence and civic activities within the service area of the proposed station outweighed Jeanetta M. Pollard's slight preference for comparative coverage which was not entitled to much weight since it involved the provision of a fourth and fifth service. See ID para. 9. Pollard's brief and exceptions, p. iii, urge that the ALJ (1) "committed prejudicial procedural error" by reopening the record and very belatedly receiving evidence regarding Ms. Carmen's employment plans, and (2) "failed to adequately weigh the significance" of Pollard's qualitative enhancement for local residence and her superior comparative coverage. Our review of the record indicates that the ALJ did not abuse his procedural discretion and did not misapply established comparative standards.

2. Carmen and Pollard are both 100% owners who will work fulltime (at least 40 hours) at the proposed stations as general managers. ID Finds. 2, 3, 7. Both applicants were awarded 100% quantitative credit for participation of ownership in management. ID Conc. 1. Carmen was preferred on a qualitative basis because of her continuing and long-time residence within the proposed station's service area, and her civic activities within that area especially those with the "Chamber of Commerce [which] have involved civic activities in Nashville itself. This experience has provided Mrs. Carmen with useful knowledge of the community needs and interests." ID Conc. 2. On the other hand, Pollard has not lived in Nashville for 14 years, the record showed no connection with the community during that period, and the length of her absence rendered it remote that she would have any continuing knowledge of changing local needs and interests. *Veterans Broadcasting Co., Inc.*, 4 RR 2d 375 (1965). ID Conc. 3. Thus, Carmen's qualitative attributes were superior to those of Pollard, and the slight preference awarded to Pollard's proposal to provide more service to persons who already received many other television services did not outweigh Carmen's preference for local residence and civic activities. ID Conc. 9.

3. Pollard's first argument is that procedurally the presiding ALJ erred in ordering the record reopened "to determine whether or not Ms. Carmen intends to give up her present employment should Ms. Carmen be the successful applicant." Tr. 65. This ruling allegedly violated the ALJ's own prehearing orders that such facts should be included in written exhibits exchanged prior to hearing. (Pollard Br. 7). The Board has previously commended ALJs who utilize such prehearing orders to help expedite resolution of complex and protracted comparative cases. *New Continental Broadcasting Co.*, 88 FCC 2d 830, note 5 (Rev. Bd. 1981) (subsequent history omitted). But it has also recognized that the presiding ALJ has broad discretion in calling for additional evidence deemed necessary to a just and fair resolution of the comparative case. *See, e.g., Van Buren Community Service*, 87 FCC 2d 1018, para. 8 (Rev. Bd. 1981). Here the record establishes no abuse of his broad discretion. The additional evidence did not constitute a variance from Carmen's proposal or upgrading. In fact, that evidence may have been collateral and unnecessary since Carmen's Hearing Ex., p. 2, exchanged in a timely fashion, established that she would serve as General Manager and Chief Operating Officer of the proposed station working on a full time basis, at least 40 hours per week, and that she was further "committed to working as many hours per day as required." These representations were not rebutted and were sufficient to establish that Carmen was entitled to full credit. See *Washington's Christian Television Outreach*, 56 RR 2d 1539, 1557 (Rev. Bd. 1984). Moreover, Pollard was not surprised or prejudiced by the additional facts developed after the record was reopened because prior to hearing in response to an interrogatory Carmen had stated that she intended to terminate her employment if successful in obtaining the proposed station.

4. The substantive arguments are even less persuasive. For example, the ALJ is criticized for basing his conclusion on a 20-year old Commission precedent, *Veteran's Broadcasting, supra*, which was handed down "before the 'great flood'. . . and . . . is more 'antediluvian' than [Pollard's] showing, as to past local residence and participation in civic affairs," Br. 12, which was only 14 years old. The ALJ's conclusion on this point is supported by ancient and recent precedent, *see, e.g., Ottumwa Broadcasting Co.*, 92 FCC 2d 1011, 1016 (Rev. Bd. 1982), and also passes the venerable test of common sense. Finally, recent precedent establishes that Pollard's comparative coverage preference should be reduced from slight to "very slight," (*Cotton Broadcasting Co.*, 60 RR 2d 982, 985 (Rev. Bd. 1986)), further weakening Pollard's second place showing.

5. ACCORDINGLY, IT IS ORDERED, That the application of RUTH PAYNE CARMEN (BPCT-840402KW) IS GRANTED; that Jeanetta M. Pollard's motion for leave to amend filed July 17, 1986, IS GRANTED, and that her application (BPCT-840530KE) IS DENIED.

Joseph A. Marino
Chairman, Review Board
Federal Communications Commission

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 85-188

In re Applications of

INDIANAPOLIS MDS CO. **File No. 50087-CM-P-74**

and

OMEGA
COMMUNICATIONS, INC. **File No. 50029-CM-P-75**

For Construction Permits In the
Multipoint Distribution Service
for a new station on Channel 2,
at Indianapolis, Indiana

Appearances

Michael D. Ridberg on behalf of Indianapolis MDS Co.; *Leo I. George* on behalf of Omega Communications, Inc.; and *Frederick Fitzgerald*, and *Howard M. Wilchins* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

Adopted: September 19, 1986; Released: October 1, 1986

By the Review Board: MARINO(Chairman), JACOBS and ESBENSEN.

Board Member ESBENSEN:

1. This proceeding had its genesis over twelve years ago when multiple parties filed applications for a new Multipoint Distribution Service (MDS) facility to operate on MDS Channel 2 at Indianapolis, Indiana. On June 10, 1985, the Commission's Common Carrier Bureau designated the applications of six mutually-exclusive applicants for comparative hearing (See 50 Fed. Reg. 24699, published June 12, 1985). The *Order* specified that evidence was to be adduced on the following issues:

"(a) the relative merits of each proposal with respect to efficient frequency use, particularly with regard to compatibility with co-channel use in nearby cities and adjacent channel use in the same city;

"(b) the anticipated quality and eliability of the service proposed, including installation and maintenance programs; and

"(c) the comparative cost of each proposal considered in context with the benefits of efficient spectrum utilization and the quality and reliability of service as set forth in Issues (a) and (b)."

2. Shortly before commencement of the initial hearing session (scheduled for October 29, 1985), only three applicants remained. Two of these applicants elected to merge (Digitial Paging Systems, Inc. (DPS), and Private Networks, Inc. (PNI)) into a new organization called Indianapolis MDS Co. (IMDS). [1] Thus, by the commencement of the hearing proceeding, only two applicants remained: IMDS and Omega Communications, Inc. (OCI). The record was closed after one day of hearing on October 29, 1985. Following the routine filing of Proposed Findings of Fact and Conclusions of Law and Reply Findings by December 20, 1985, Administrative Law Judge Walter C. Miller (ALJ) promptly issued his Initial Decision (ID), FCC 86D-20, on March 19, 1986. IMDS was found to be the superior applicant, and the application of OCI was denied.

3. Now before us are the exceptions filed by OCI and the replies filed by IMDS and the Common Carrier Bureau (Bureau). We have reviewed the ID in light of the exceptions and reply briefs, the oral argument held August 1, 1986, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm the ALJ's ultimate conclusion that the grant of the application of IMDS would best serve the public interest, convenience, and necessity.

4. As cogently noted by the ALJ in his ID (Findings, Para. 3), and by the Bureau at the oral argument in this proceeding (Tr. 304-305), apparently very few MDS cases have wallowed through the hearing process. As Bureau counsel stated:

"This is a very low-profit service. No one wants to go to hearing in it. Of the two cases which have gone to hearing, one, an individual, represented himself and apparently did not know how to avoid a hearing; the other one was this case. And I'm sure I don't know how it got into this particular situation." (Tr. 305).

At the close of the oral argument, we requested that the parties report to us, within thirty days, the status of settlement negotiations. Now, some forty-five days later, no party to this proceeding has responded to our request. Thus, since the applicants are obviously unable or unwilling to reach an amicable solution, or to expend additional legal fees to furnish us with a courtesy response, we will make the decision for them.

5. The governing considerations herein have been clearly enunciated by the Commission in *Frank K. Spain, d/b/a Microwave Service Company*, 77 F.C.C. 2d 20 (1980). Therein, the Commission set forth the pertinent issues to be considered in granting an MDS construction permit:

"Section 307(b) of the Communications Act, 47 USC 307(b), requires that '[i]n considering applications for licenses . . . the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.' Along with other public interest factors, this statutory language would seem to require the Commission to carefully consider the efficient use of the radio spectrum, particularly where the demand for frequency assignments exceeds the supply. The root problem of MDS is perhaps the critical shortage of available radio spectrum in comparison to demand. This increasingly is causing technical problems as applicants propose to locate stations more closely so as to be able to serve more communities. [Footnote omitted]. *For that reason, we consider this issue to have continued viability in a hearing context and, in fact, to be the preeminent factor in resolving comparative cases.*

* * *

A central goal of any application should be to maximize frequency utilization by optimizing the efficiency of co-channel and adjacent channel use. The essential nature of these performance standards is highlighted by the limited amount of available frequency spectrum and the risk of inadvertent interference or blockage of frequency use. [Thus,] in focusing on the matter of compatibility of adjacent channel and co-channel operation, two facts are central: design and location.

* * *

We want to emphasize that the applicants must be aware of their responsibility to design a system well from both a current technological approach and a prospective management and service viewpoint. *With respect to location, it may be highly desirable, if not essential, that the transmit antennas for both channels 1 and 2 be either co-located or located very near each other.* Otherwise, adjacent channel interference can easily result." 77 FCC 2d 20, 23-24 (Emphases added).

6. Herein, IMDS proposes to *co-locate* its facility with existing Channel 1 MDS station WPX-33 atop the Indiana National Bank Tower (with an antenna 1237' AMSL), while OCI proposes to install its facility atop the Merchant Bank Building. The proposed transmitter site of OCI is approximately 0.26 miles distant from WPX-33. OCI's antenna is proposed at 960' AMSL (OCI Exh. 1). Therefore, with respect to Issue (a), and pursuant to the guidelines set forth in *Frank K. Spain, supra*, IMDS receives a decisional comparative preference in this proceeding based upon its engineering and site location. With respect to Issues (b) and (c), we concur with the ALJ that both parties have made no more than perfunctory showings and neither therefore is entitled to a preference. More specifically, and in any event, OCI has not introduced evidence or testimony with respect to these issues to overcome the solid engineering preference awarded IMDS pursuant to Issue (a). OCI further argues that it should have been allowed to demonstrate at hearing that it would change its proposed transmitting antenna in order to eliminate potential interference to station WPX-33, and to demonstrate that it could change its proposed transmitter site to achieve the same result. This eleventh-hour attempt, eleven years after it had filed its application, amounts to no more than a transparent effort by OCI to comparatively up-grade its application. Such an effort is manifestly inappropriate, especially in MDS proceedings, since "the preeminent factor in resolving comparative [MDS] cases" is the engineering proposal of the applicant. *Frank K. Spain, supra* at 23.

7. The exceptions of OCI pertaining to the ALJ's finding that IMDS is entitled to a comparative preference for proposing a greater coverage area are moot since IMDS is the clearly preferred applicant on the other engineering criteria set forth hereinabove. We hasten to observe, however, that the language of *Frank K. Spain, supra*, at 23, would appear to indicate that the Commision must "carefully consider the efficient use of the radio spectrum" in awarding an MDS permit. We note that IMDS's proposed antenna is about 300' higher than that proposed by OCI. Since MDS facilities (as OCI candidly admits in its Exceptions) "require line-of-sight capability," MDS-station coverage area is a function of antenna height and power.[2] 0Thus, IMDS has proposed a more efficient use of the spectrum. Again, however, in the instant proceeding, this question is rendered moot by the superior co-located site of IMDS. Nevertheless, for the guidance of other comparative applicants, we believe that certain comparative coverage evidence may be adduced in MDS proceedings, absent a specific issue, under Issue (a) as framed. Issue (a), setting forth the "essential" and "preeminent" comparative considerations, clearly contemplates "efficient frequency use" evidence to the extent delineated in *Peabody Telephone Answering Service*, 55 FCC 2d 626 (1975). In *Frank K. Spain, supra*, the Commission clarified several of the comparative considerations originally enunciated in *Peabody*, and stated that "many elements are relevant in making an Issue(a) showing . . . ." Thus, we believe that, under Issue(a), the following language of *Peabody* is operative and comparative coverage data may be considered in the limited context intended:

Generally speaking, the applicant which offers the *greatest effective service area* *. . . should be preferred.

*In context with MDS, the term 'service area' is not considered synonymous with general population density. *Rather, it should be considered that area representing the largest concentration of potential users." Peabody, supra*, at 627. (Emphasis added).

8. OCI also excepts to the ALJ's determination that it must be given a comparative demerit for proposing to operate with only 10 watts. We agree with OCI. While Section 21.904(a) of the Commission's Rules specifies that MDS facilities shall operate with a transmitter output power of only 10 watts, Section 21.904(b) provides for an increase in power to 100 watts under certain circumstances, which appear to be routine. More specifically, Bureau counsel reported that it is a rather *pro forma* exercise for an MDS applicant to obtain permission (pursuant to Section 21.904(b)) to increase its power to 100 watts:

[BUREAU COUNSEL]: Well, when somebody actually goes in and starts to operate, they find that such things as foliage and so forth obstructs their operation. So they say: 'I want more wattage'. The Commission said: 'Okay, try 100 [watts].

* * *

Come in at 10 [watts] and we'll give you 100 [watts]once you get in there because it simply has not worked the way it was anticipated . . . . And here they guessed that 10 watts would do it. It has not worked in practice." (Tr. 308-309).

Thus, OCI should not be faulted for its initial 10-watt proposal, and its comparative demerit will be set aside.

9. Finally, OCI objects to the failure of the ALJ to attach to the grant of IMDS's application the condition set forth in the *Order, supra*, designating this proceeding for comparative hearing. We concur and will add the condition. In that regard, we note that this condition, which relates to the basic qualifications of Digital Paging Systems (one of the merged parties in IMDS), and its parent company, Graphic Scanning Corporation, to be a Commission licensee, concerns the outcome of the proceeding in A.S.D. Answering Service, Inc., et al., FCC 82-39, released August 24, 1982. However, the merged parties comprising

IMDS have taken this possibility into account in their Joint Venture Agreement, filed October 23, 1985. At paragraph 4(d) of this Agreement, provision is made so that the remaining joint venturer may purchase the interest of a disqualified joint venturer at appraised fair market value of the facility.

10. *Conclusion*: Based upon the foregoing, we affirm the ALJ and conclude that IMDS is entitled to a decisional comparative preference under Issue (a) specified in this proceeding. No preference to either party will be awarded under Issues (b) and (c). Thus, IMDS is the clear comparative winner.

11. ACCORDINGLY, IT IS ORDERED, that the application of Omega Communications, Inc. (File No. 50029-CM-P-75) IS DENIED, and the application of Indianapolis MDS Co. (File No. 50087-CM-P-74) IS GRANTED subject to the following condition:

"That the grant is without prejudice to, reexamination and reconsideration of that company's qualifications to hold an MDS license following a decision in the hearing designated in *A.S.D. Answering Service, Inc., et al.*, FCC 82-391, released August 24, 1982, and shall be specifically conditioned upon the outcome of that proceeding."

Eric T. Esbensen
Member, Review Board
Federal Communications Commission

FOOTNOTES

[1] The Joint Venture agreement, merging PNI and DPS and proposing prosecution of DPS's application, was approved by *Order*, 85M-4213, issued October 8, 1985.

[2] OCI's other engineering logic in its Exceptions (para. 3) and at oral argument (Tr. 271-272) is specious if not preposterous:

[MR. JACOBS]: [FM is] not line of sight?

[COUNSEL FOR OCI] No. FM Broadcasting? It's not line of sight.

[CHAIRMAN MARINO]: It's not?

[COUNSEL FOR OCI]: No.

[MR. ESBENSEN]: I believe that's news to this Board.

[CHAIRMAN MARINO]: TV isn't line of sight?

[COUNSEL FOR OCI]: No, clearly not in the same – not when you have 50,000 watts.

We respectfully direct counsel's attention to Section 73.315(b) and 73.685(b) of the Commission's Rules.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

MARGARET GARZA MM DOCKET NO. 84-970
Bakersfield, California

File No. BPH-830202AG

KERN COMMUNICATIONS
COMPANY MM DOCKET NO. 84-971
Bakersfield, California

File No. BPH-831202AX

For Construction Permit
for a New FM Station

Appearances

Dennis P. Corbett and Steven A. Lerman, on behalf of *Margaret Garza, and Frank J. Martin, Jr.*, on behalf of Kern Communications Company.

DECISION

Adopted: September 26, 1986; Released: October 3, 1986

By the Review Board: MARINO(Chairman), JACOBS, and ESBENSEN.

Board Member JACOBS:

1. By Initial Decision (I.D.), FCC 86D-25, released March 27, 1986, presiding Administrative Law Judge (ALJ) Joseph Stirmer concluded that the application of Margaret Garza (Garza) was superior to that of Kern Communications Company (Kern) in their comparative hearing competition for authority to construct a new FM broadcast station on Channel 296A at Bakersfield, California. In reaching this decision, the ALJ also decided two potentially disqualifying misrepresentation/lack of candor issues in Garza's favor. It is to these conclusions alone, and not the standard comparative issue, that Kern has essentially addressed its exceptions.* The Review Board has reviewed the I.D. in light of these exceptions and Garza's reply brief, the oral argument held August 8, 1986, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law as a full and accurate reflection of the record evidence, Commission policy, and case precedent, and affirm his conclusion that grant of Garza's application will best serve the public interest, convenience, and necessity.

2. At Kern's request, by Memorandum Opinion and Order, FCC 85M-3839, released October 2, 1985, the ALJ added potentially disqualifying issues against Garza to inquire into whether its answers and supplementary answers to prehearing interrogatories misrepresented facts or lacked candor by claiming that Margaret Garza, the applicant's sole proprietor (100% owner), held a B.A. degree from California State University as of April 20, 1985, and by claiming that she was employed as a teacher at Lawrence Junior High School in Chatsworth, California, in March-April 1985 and was no longer a student at California State. At hearing Ms. Garza conceded that she had made a "mistake" in asserting that she already had received her B.A. degree, but explained that she did not intend to deceive or mislead anyone; had completed all of her degree requirements except for one course in which she received an "incomplete" and erroneously thought she would receive credit for makeup work; expected to obtain her degree before she became general manager of the proposed station; and regarded the interrogatory and her answer as an opportunity to provide a "shorthand summary of her basic academic background." I.D., para. 19. Ms. Garza further revealed that she was presently enrolled in another final degree course and anticipated receiving her degree in January 1986. (We take official notice that Ms. Garza was awarded a B.A. degree by California State on January 2, 1986. Attachment to Garza Reply to Exceptions.) The ALJ concluded that while Garza's interrogatory answer was "premature and incorrect," her representation was more in the nature of an exaggeration of a matter of dubious materiality than a deliberate misrepresentation designed to mislead the Commission. Id., para. 26 and n. 5. Hence, citing *Horne Industries, Inc.*, 94 FCC 2d 815, 819-21, 54 RR 2d 249, 253-55 (Rev. Bd. 1983), he held that, at most, this matter would warrant a very slight comparative demerit, I.D., para. 26, but that any comparative demerit was foreclosed by the Commission's new character qualifications policy statement, *Character Qualifications*, 102 FCC 2d 1179, 59 RR 2d 801 (1986).

3. As to the employment/student issue, at the November 1985 post-enlargement hearing Ms. Garza steadfastly maintained that she was indeed "employed" as a teacher in March-April 1985, because she taught two classes a day, five days a week, and was in fact working at the junior high school with all the duties and responsibilities of a teacher, albeit without compensation, and was variously called student teacher, practicing teacher, and associate teacher. *I.D.*, para. 21. Previously, at the May 1985 pre-enlargement hearing session, Ms. Garza similarly described her role as "a part-time teacher . . . on a trial basis." Id., para. 20. With respect to her student status, Ms. Garza testified that while she was student teaching she was "officially enrolled" at California State but was "not at school" because of her teaching burdens (Tr. 201), and that she was not pursuing any course or class work at that time (Tr. 215). The ALJ concluded that no adverse conclusions were warranted on these facts, since Ms. Garza was indeed employed or occupied as a part-time teacher, not a student, and that the controversy was one of semantics and interpretation, not misrepresentation or lack of candor. I.D., para. 25.

4. In its exceptions, Kern staunchly maintains that ample record evidence exists to disqualify Garza for misrepresentation or lack of candor under either one or both of the above character issues, and that, at minimum, the ALJ should have assessed a substantial and decisive character demerit against Garza, which would have rendered moot the comparative issue here and caused Kern to be declared the winner, citing *Broadcast Associates of Colorado*, 100 FCC 2d 616, 59 RR 2d 741 (Rev. Bd. 1985)(heightened substantial demerit for false deposition testimony). Kern urges that the ALJ improperly trivialized what Kern perceives as serious and intentional deceits on Ms. Garza's part as to matters which may seem immaterial to the ALJ and the Board but were important credential representations in Ms. Garza's eyes.

5. Kern's character exceptions will be denied. Shortly after Kern filed its brief, the Commission issued a Memorandum Opinion and Order in *Broadcast Associates of Colorado*, 60 RR 2d 721 (1986), which clarified the *Character Policy Statement*, *supra*, and wiped out the comparative character demerit that the Board had assessed in *Broadcast Associates*. In its Order, the Commission flatly rejected the Board's intimation elsewhere that it was still permissible under the new *Character Policy Statement* to assess a comparative demerit where a character issue had initially been added on a disqualifying basis. 60 RR 2d at 723 n. 5. Instead, the Commission held that the only proper inquiry was whether the character conduct in question was *disqualifying* and concluded that the Board-demerited conduct was not disqualifying. *Id.* at 723. Hence, the previously demerited application was granted. *Id.* at 724.

6. In *Broadcast Associates*, *supra*, the Commission emphasized that, as here, an ALJ's credibility findings concerning witness testimony are entitled to great weight. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Gateway Broadcasting Enterprises, Inc.*, 58 FCC 2d 63, 66, 36 RR 2d 471, 474 (1976); *Gilmore Broadcasting Corp.*, 95 FCC 2d 289, 293, 54 RR 2d 1265, 1268 (Rev. Bd. 1983). Whether we call Ms. Garza's miscues "fibs," *Horne Industries, Inc.*, *supra*, "exaggerations," para. 2, *supra*, or puffery, it is clear that they illustrate the plague of "resume inflation" that currently afflicts the Nation and has infected even law firm recruitment. *See* A.B.A.J., May 1, 1986, at 25. Where, as here, the facts are so close to the "absolute truth" and the materiality of the discrepancies (as well as the materiality of the facts themselves) is *de minimis*, we share the ALJ's conclusion that a serious intent to misrepresent or deceive cannot be extracted from the evidence, or, even if ever so slightly present (see paragraph 2, *supra*), there is not enough of a scent to warrant disqualifying Garza. *Broadcast Associates of Colorado*, *supra*, 60 RR 2d at 724; *Character Qualifications*, *supra*.

7. Finally, Kern obliquely requests that a real party in interest issue be added against Garza and the proceeding be remanded to inquire into the identity and role of an unidentified person or persons who supposedly paid some of Garza's legal and engineering expenses. The only basis for this belated inquiry are the facts that Ms. Garza's father and his employer, Mr. Edward Hopple, once applied for an FM station in the Bakersfield area and that Ms. Garza testified that she used only "some" of her own funds to pay the applicant's bills (Tr. 110). These are insufficient facts to establish a *prima facie* case for either a real party or a financial issue, and the ALJ properly refused to permit Kern's counsel to pursue these matters at hearing without a better foundation and specifically designated issues. *See Las Misiones de Bejar TV Co.*, 93 FCC 2d 191, 53 RR 2d 119 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1481 (Comm'n 1984). Indeed, as Garza argues, the familiarity with and control over her application that Ms. Garza demonstrated in her testimony on cross-examination (Tr. 92-101) effectively aborted Kern's hoped-for fishing expedition before it could leave port. All decisionally significant exceptions having been duly considered, we affirm the ALJ's grant of Garza's application.

8. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed by Kern Communications Company on July 10, 1986 IS DENIED; and the petition for leave to supplement exceptions filed by Kern Commmunications Company on May 13, 1986 IS GRANTED;

9. IT IS FURTHER ORDERED, That the application of Margaret Garza (File No. BPH-830202AG) for a construction permit to establish a new FM broadcast station at Bakersfield, California IS GRANTED, and the application of Kern Communications Company (File No. BPH-831202AX) IS DENIED.

Jerold L. Jacobs
Member, Review Board
Federal Communications Commission

FOOTNOTES

* The Board rejects outright Kern's false economy in attempting to incorporate by reference its earlier-filed proposed findings of fact and conclusions of law and its reply findings as exceptions to the I.D.'s treatment of the standard comparative issue (Kern Br. at 5). The Commission's Rules allowed Kern 13 more pages for its overall presentation than it actually used and specifically require pointing out "with particularity alleged material errors in the decision . . . and . . . specific references to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based." Section 1.277(a), 47 CFR 1.277(a). Incorporation by reference is an impermissible substitute. *Filing Exceptions & Briefs Before Review Board*, 69 FCC 2d 1193, 44 RR 2d 960 (Rev. Bd. 1978). Hence, Kern's unarticulated objections to the ALJ's comparative analysis are waived. Section 1.277(a), 47 CFR 1.277(a).

Before the
Federal Communications Commission
Washington, D.C. 20556

MM Docket No. 84-14

In the Matter of

Amendment of Section 73.202(b),	
Table of Allotments,	RM-4601
FM Broadcast Stations,	RM-4720
(Cookeville, Donelson[1]	RM-4826
Livingston, Lebanon, Celina,	RM-5180
South Pittsburg [1],	RM-5181
Goodlettesvile, and	RM-5182
Smyrna [1], Tennessee)	

REPORT AND ORDER

(Proceeding Terminated)

Adopted September 24, 1986 Released: October 10, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Further Notice of Proposed Rule Making, 50 Fed. Reg. 33607, published August 20, 1985, soliciting comments on five options involving the upgrading of an existing allotment at Cookeville, Tennessee, and adding new allotments to the FM Table of Allotments at the above captioned communities. Comments were filed by Marion County Broadcasters, Inc., William O. Barry, Sena Fletcher, John Heidelberg, Smyrna Broadcasting, David E. Goff, WHUB, Inc., and Gallaher and Huffines. Bart Walker filed reply comments. Gallaher and Huffines has also filed a Motion to Accept Late Filed Comments, a Supplement to Comments and a Motion to Hold Proceeding in Abeyance. Smyrna Broadcasting Corporation filed a Motion to Strike directed against the reply comments of Bart Walker.

Background

2. The original Notice in this proceeding was issued as a result of a petition for rule making filed by Gallaher and Huffines, licensee of FM Station WGSQ, Cookeville, Tennessee, requesting the substitution of Class C Channel 234 in lieu of its existing Channel 232A allotment. In response to that Notice, William O. Barry submitted a counterproposal proposing Channel 229C2 to Cookeville in lieu of Channel 234 in order to permit the allotment of Channel 233A in Lebanon, Tennessee. Subsequently, the Lebanon proposal was amended to Channel 246A which, in turn, conflicted with a pending petition to allot Channel 246 to Livingston, Tennessee. Shortly thereafter, in late-filed reply comments, Gallaher and Huffines proposed the additional allotment of Channel 246 to Cookeville in order to comply with the criteria adopted in Modification of FM and Television Station Licenses, 98 FCC 2d 916 (1984) which would permit the direct modification of the Station WGSQ license if another equivalent Channel could be allotted to Cookeville for general application. During the pendency of this proceeding, the Commission had under consideration numerous counterproposals filed in response to the Notice of Proposed Rule Making MM Docket 84-231 (the "omnibus proceeding"). Two of the counterproposals proposed that Channel 246 be allotted to communities which conflicted with the proposed uses at Cookeville and Livingston. Specifically, John Heidelberg proposed Channel 246C2 for Goodlettesville, Tennessee and David E. Goff proposed Channel 246C1 for Celina, Tennessee. These proposals were incorporated into this proceeding.

3. The other requests for the use of Channel 246 precluded its use as an alternate available channel allotment for Cookeville to satisfy the equivalent channel requirement contained in Section 1.420(g) of the Rules. Furthermore, our own engineering studies determined that Channel 246 could be allotted to only one of the five communities. In addition, reply Comments submitted by Gallaher and Huffines advanced other issues which the other proponents for different communities did not have an opportunity to respond the most efficient use of the channel, populations served and the availability of other services. Moreover, the proposals for Livingston and Lebanon were not previously noticed by the Commission in this proceeding since they were filed in connection with MM Docket 84-231. Therefore, we were unable to determine on the basis of information resulting from the original Notice in this proceeding that the allocation of Channel 246 to Cookeville would best achieve the objectives of Section 307(b) of the Act. Consequently, it became necessary to issue the Further Notice to allow interested parties to submit comments on which community should receive the Channel 246 allotment and address the matter raised by Gallaher and Huffines in their reply comments.

4. We solicited comments on these five options:

OPTION I

	PRESENT	PROPOSED
Celina, Tennessee	268A	229A, 268A
Cookeville, Tennessee	232A, 252A	234, 246, 252A
Goodlettesville, Tenneessee	—	294A
Livingston, Tennessee	240A	240A, 255A

OPTION II

	PRESENT	PROPOSED
Celina, Tennessee	268A	229A, 268A
Goodlettesville, Tennessee	—	294A
Lebanon, Tennessee	298	246A, 298
Livingston, Tennessee	240A	240A, 255A

OPTION III

Celina, Tennessee	268A	229A, 268A
Goodlettesville, Tennessee	—	294A
Livingston, Tennessee	240A	240A, 246

OPTION IV

Celina, Tennessee	268A	246C1, 268A
Goodlettesville, Tennessee	—	294A
Livingston, Tennessee	240A	240A, 255A

OPTION V

Celina, Tennessee	268A	229A, 268A
Goodlettesville, Tennessee	—	246C2
Livingston, Tennessee	240A	240A, 255A

Counterproposals

5. Three parties have submitted counterproposals in response to the Further Notice. 1) Marion County Broadcasting Services, Inc. proposed Channel 247C2 for South Pittsburg, Tennessee as a first fulltime local service. This would conflict with the proposed Channel 246C allotment for Livingston (Option III) and the proposed Channel 246C allotment for Cookeville (Option I). As an alternative which would accommodate the Channel 247C2 allotment in South Pittsburg, Marion County Broadcasting suggested modification of the Channel 246C proposals for Livingston and Cookeville to Channel 246C1. 2) William O. Barry has filed two counterproposals. The first counterproposal requested Channel 246A at Donelson, Tennessee, which would conflict with a Channel 246C1 allotment in Celina (Option IV), a Channel 246C2 allotment in Goodlettesville (Option V), a Channel 246A allotment in Lebanon (Option II), and a Channel 246A allotment in Livingston (Option III). William O. Barry has also proposed a Channel 231A allotment for Woodbury, Tennessee which conflicts with the proposed Channel 234C allotment for Cookeville (Option I). 3) Smyrna Broadcasting Corporation submitted a counterproposal for Channel 231A at Smyrna, Tennessee which conflicted with a Channel 234 allotment for Cookeville (Option 1) as well as the proposed Channel 231 for Woodbury.

Discussion

6. It is necessary to dismiss one of these proposals for technical reasons – the counterproposal by Smyrna Broadcasting Corporation for Channel 231A at Smyrna, Tennessee. This proposal is short-spaced to first-adjacent Class C FM Station WKTG, Madisonville, Kentucky by 9.9 kilometers. With the required 16-kilometer buffer zone, Section 73.207 of the Rules requires a 185-kilometer separation instead of proposed 175.1-kilometer separation. Three other proposals shall also be dismissed. The proposed Channel 255A and Channel 246 allotments for Livingston, Tennessee and the Channel 231A petition for Woodbury. In each instance no party, including the respective petitioners, has expressed an interest in applying for either of the proposed allotments. This latter defect is not eliminated by the subsequent late filed expression of interest in reply comments by Bart Walker for the Woodbury proposal.2 Cf. Santa Isabel, Puerto Rico, 51 Fed. Reg. 6119, published February 20, 1986.

7. On April 15, 1986, the Commission adopted the Report and Order in MM Docket No. 85-313 which provided for adjacent channel upgrades without the need for an equivalent FM channel available for general application. Modification of FM Broadcast Licenses to Higher Class Co-channel or Adjacent Channels, 51 Fed. Reg. 20290, published June 4, 1986. That Report and Order was held to be applicable to all pending proceedings. Consequently, we are able to modify the Station WGSQ license through rule making from Channel 232A to Channel 234C without providing another FM channel to Cookeville for general application.3 In the present situation, the underlying proposal for Channel 234C in Cookeville has already been included in a notice soliciting public comment and/or counterproposals. In regard to Cookeville, we no longer have any conflicting counterproposal before us and we have received no comments on why a Channel 234C allotment in Cookeville would be contrary to the public interest. Therefore, we will modify the WGSQ license to specify operation on Channel 234C.4 Since it is no longer necessary to consider a Channel 246C allotment for Cookeville, there are now only four proposals for a Channel 246 allotment before us. These are Channel 246A for Donelson, channel 246C1 for Celina, Channel 246C2 for Goodlettesville and Channel 246A for Lebanon.

8. After careful consideration of this matter, we will allot FM Channel 246C2 to Goodlettesville as a first local service. This action is consistent with both Section 307(b) of the Act and the Commission action in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 1982, which set forth priorities with respect to conflicting FM channel proposals. These FM allotment priorities were as follows: 1) first full-time aural service. 2) second full-time aural service. 3) first local service and 4) other public interest matters. As to the Channel 246C1 allotment in Celina, David E. Goff, the proponent, asserts that his proposal would result in a first FM service and a first nighttime aural service to 302.7 square miles with a population of 7,598 people and a second FM and nighttime aural service to an area of 931.6 square miles with a population of 35,581. Accordingly, David E. Goff argues that this proposal would achieve priorities 1 and 2 as set forth in Revision of FM Assignment Policies and Procedures, supra, in that it would provide a first full-time aural service and a second full-time aural service. However, our review of this matter, including separate engineering exhibits submitted by Gallaher and Huffines and John Heidelberg, does not indicate that a Channel 246C1 allotment will provide a first aural service. Even assuming maximum facilities by a Channel 246C1 FM station in Celina, the entire service area would be within the 0.5 mV/m primary service contour of AM Station WSM, Nashville, Tennessee. See Anamosa and Iowa City, 46 FCC 2d 520, 525 (1974). We also concur with the engineering exhibit by John Heidelberg that communities of over 2,500 people within the 0.5 mV/m service area already receive at least two FM signals. In addition, a Channel 246C1 allotment in Celina would not provide a second full-time aural service when we consider the service which will be provided by our action allotting FM Channel 234C to Cookeville. As a consequence, a Channel 246C1 allotment in Celina as a second FM outlet would not meet either priority 1 or 2. Thus the Channel 246C2 proposal for Goodlettesville as a first local service under priority 3 would be a higher priority. The allotment to Goodlettesville would also prevail over the proposed Channel 246A allotments to Lebanon or Donelson which both have at least one local service and receive other broadcast services. Therefore, we will allot Channel 246C2 to Goodlettesville as a first local service and the non-conflicting Channel 229A to Celina as a second local service. The Channel 234 allotment to Cookeville requires a site restriction of 4.4 kilometers southeast and a relocation of Station WSMT-FM, Channel 288A, Sparta, Tennessee to a point 11.3 kilometers southeast of Sparta.5 The Channel 246C2 allotment in Goodlettesville requires a site restriction of 15.2 kilometers east.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303 (g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 17, 1986, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the following communities:

City	Channel No.
Celina, Tennessee	229A, 268A
Cookeville, Tennessee	234, 252A
Goodlettesville, Tennessee	246C2

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gallaher and Huffines for Station WGSQ, Cookeville, Tennessee IS MODIFIED to specify operation on Channel 234 in lieu of Channel 232A subject to the following conditions:

(a) The licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may not be conducted in accordance with Section 73.1620 of the Rules and will not be authorized until the aforementioned transmitter relocation by Station WSMT-FM, Sparta, Tennessee is licensed., and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

11. The window period for filing applications on the Channel 229A allotment in Celina, Tennessee and the Channel 246C2 allotment in Goodlettsville, Tennessee will open on November 18 , 1986 and close on December 17, 1986.

12. IT IS FURTHER ORDERED, That the counterproposals filed by Smyrna Broadcasting Corporation for Channel 231A in Smyrna, Tennessee; Cherokee Nation Standing Stone Broadcasting Company for Channel 246 in Livingston, Tennessee; and William O. Barry for Channel 231A for Woodbury, Tennessee ARE DISMISSED.

13. IT IS FURTHER ORDERED, That the petition for rule making filed by William O. Barry for Channel 246A in Lebanon, Tennessee IS DENIED.

14. IT IS FURTHER ORDERED, That the counterproposals filed by David E. Goff for Channel 246C1 in Celina, Tennessee., and William O. Barry for Channel 246A in Donelson, Tennessee, ARE DENIED.

15. IT IS FURTHER ORDERED, That the Motion to Hold Proceeding in Abeyance filed by Gallaher and Huffines, IS DISMISSED as moot,

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202)634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] These communities have been added to the caption. Public Notice for these counterproposals was given on October 11, 1985, Report No. 1542.

[2] See Section 1.420(d) of the Rules. It should also be noted that the Bart Walker reply comments did not include a certificate of service to other parties in this proceeding as specifically required by Section 1.420(c) of the Rules.

[3] As a consequence, the counterproposal advanced by Marion County Broadcasting Service, Inc. for Channel 247C2 in South Pittsburg, Tennessee is being separated from this proceeding and will be considered as a counterproposal in MM Docket No. 85-317 in connection with the pending proposal for Channel 247A in Trenton, Georgia.

[4] We are dismissing as moot a Motion to Hold Proceeding in Abeyance filed by Gallaher and Huffines which requested that action in this proceeding be withheld pending a conclusion of MM Docket 85-313, Modification of FM Broadcast Licenses, supra.

[5] Gallaher and Huffines have entered into an agreement with the licensee of Station WSMT-FM looking toward this relocation of the WSMT-FM transmitter.

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. E-85-11

In the Matter of

MCI TELECOMMUNICATIONS, INC.,
Complainant,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted September 30, 1986; Released October 6, 1986

By the Chief, Common Carrier Bureau:

1. We have before us a motion for an extension of time filed on September 24. 1986. by the American Telephone and Telegraph Company (AT&T). AT&T seeks permission to file its report concerning the eighth quarter results of the Reach Out America Optional Calling Plan no later than October 7, 1986, rather than the September 30 date required by paragraph 33 of the Commission's Order in the above-captioned case. *MCI Telecommunications , Inc .v AT & T*, FCC 86-300 (released July 2, 1986). AT&T states that several of the local exchange carriers were unable to provide complete customer usage data in a time frame that would permit it to meet the scheduled due date. This one-week delay would not appear to prejudice any interested party. For these reasons, good cause has been shown for this request.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the request for an extension of time IS GRANTED. AT&T'S report is due no later than October 7, 1986.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

INTERCONTINENTAL COMMUNICATIONS/ CELLULAR, INC.

File No. 32749-CL-P-094-A-84

For a construction permit in the
Domestic Public Cellular Radio
Telecommunications Service for the
Saginaw-Bay City-Midland, Michigan
Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted September 19, 1986; Released October 6, 1986

By the Common Carrier Bureau:

1. Saginaw Mobile Telephone System (SMTS) has filed a Petition to Dismiss or Deny the captioned application. The Alliance, consisting of applicants who entered into a partial settlement agreement in the Saginaw, Michigan Metropolitan Statistical Area (Saginaw MSA), similarly has filed a Joint Petition to Dismiss or Deny. Intercontinental Communications/Cellular, Inc. (Intercontinental), the nonwireline lottery selectee in the Saginaw MSA, has replied. Both petitions raise issues concerning the sufficiency of Intercontinental's financial showing.

2. SMTS argues that Intercontinental does not provide reasonable assurance of the funds needed to meet its construction costs and the costs of operating for one year, as required by Section 22.917(a)(l) of the Commission's Rules. In its application, Intercontinental provides a bank letter from the Palmer National Bank (Palmer) stating "we are prepared to make available to you up to $16,000,000 for the purpose of funding your cellular venture" in the thirty Round IV cities for which Intercontinental filed cellular applications. However, the amount of secured and unsecured loans which national banks may make is limited by federal banking statutes to an amount equal to 25% and 15%, respectively, of the sum of the bank's unimpaired capital and surplus. 12 U.S.C. Sections 84(a)(1) and 84(a)(2), 12 C.F.R. Section 32.4. SMTS asserts that as of March 31, 1986, Palmer's secured loan amount limit is $1,192,500 (25% of $4,770,000), and the unsecured loan amount limit is $712,500 (15% of $4,770,000).

3. Intercontinental's estimated costs for construction and first-year operation in the Saginaw MSA are $1,122,000. SMTS submits that Intercontinental also relies on Palmer for reasonable assurance of funds for its Augusta, Georgia MSA application to finance estimated costs for construction and first-year operation totaling $748,000. Because a financial source may not commit the same funds to more than one cellular application,[1] and because the expenses of Augusta and Saginaw together exceed Palmer's apparent lending ability,[2] SMTS argues that Intercontinental has failed to make a showing of reasonable assurance that funds are available.

4. Next, both SMTS and the Alliance argue that the bank letter is not sufficiently specific to provide reasonable assurance because it does not state the term of the loan. They also assert that although the letter contemplates a one-year moratorium on payments and specifies that repayments will be made annually thereafter, it does not state either the number of years for which repayment may be made or the dollar amount of repayment. Therefore, they argue, the letter is too vague to meet the reasonable assurance standard.[3]

5. Intercontinental responds that the Commission has already found the Palmer bank letter acceptable for the purposes of reasonable assurance. *American Lo - Power TV Network Inc.*, 103 F.C.C.2d 4, 9 (1986). Regarding Palmer's lending limitations, Intercontinental concedes that "a bank letter committing funds in excess of the bank's statutory lending limit does not establish reasonable assurance of the availability of the loan." However, Intercontinental argues that it is entitled to make a "further showing" that correspondent banks are willing to participate in the proposed loan. To that end, Intercontinental submits an amendment which includes an affidavit from Webb C. Hayes, the Chairman of the Board and President of Palmer Bank. Mr. Hayes avers that he is "very confident that the Bank will be able to participate with correspondent banks to provide the necessary funds to Intercontinental. The Bank has placed many such syndication loans in the past.". Mr. Hayes lists three banks with which Palmer "does syndications regularly": Sovran Bank (Sovran) , American Security Bank (American Security) , and First American Bank (First American). Intercontinental's amendment also provides letters from officers of each of the three banks. Sovran Bank indicates its "interest in considering a participation with your bank" to finance cellular systems in Shreveport, La., Augusta, Ga., and Saginaw, Mich. American Security Bank "is willing to consider a participation with" Palmer to finance the proposed systems in Shreveport and Augusta. Finally, First American "would be interested in participating in a loan with Palmer" for financing in either Augusta or Shreveport. Intercontinental is the tentative selectee in Augusta and Saginaw, but not in Shreveport.

Discussion

6. Generally, the Commission's policy regarding bank letters is that, assuming the terms of the loan commitment meet the reasonable assurance test, and in the absence of a showing which raises doubt as to the banks's ability to make the loan, the letter will be presumed to meet the financial showing requirement. However, "where the proposed loan would *prima facie* violate statutory limitations governing the amount a particular bank may lend, the Commission may require a 'further showing' of availability." *KIST Corporation*, 99 F.C.C. 2d 173, 178 (Rev. Bd. 1984).

7. The Commission has found that the Palmer bank letter, on its face, contains a commitment to finance all of Intercontinental's Round IV cellular proposals and thus meets the reasonable assurance test as to the level of specificity required. *American Lo - Power TV Network, supra*. However, Mr. Hayes' affidavit concedes that Palmer does not have the ability to lend more than $775,000 on a single loan. This amount is not sufficient to cover the costs for both the proposed Augusta and Saginaw systems.[4] Accordingly, if Intercontinental's proposed Saginaw cellular systems is to be properly financed, a reasonable assurance of funds from another source must be demonstrated.[5]

8. Review of the letters from American Security and First American shows that the banks refer to participation with Palmer only in the Shreveport and Augusta markets. These letters do not make a commitment of any funds to Intercontinental for the Saginaw market. As for the letter from Sovran, a showing must be made that the bank is willing to to participate in lending the necessary funds. *KIST Corporation, supra*, at 179. The Commission will not accept a bank letter which states that the bank will "consider" financing a cellular system. *Boston Designation Order*, 52 Rad. Reg. 2d (P&F) 1045. The bank commitment letter must be a commitment and not just an expression of interest. *Order on Reconsideration*, FCC 86-41, Mimeo 36439, released January 24, 1986. Sovran's letter expresses that it is "interested in considering" participation with Palmer. We find that this language does not meet the reasonable assurance standard. Accordingly, the letter can not be counted towards Intercontinental's financial showing. As a result, we conclude that Intercontinental's application is defective.

9. Accordingly, IT IS ORDERED That the Petition to Deny filed by Saginaw Mobile Telephone System IS GRANTED.

10. IT IS FURTHER ORDERED That the captioned application of Intercontinental Communications/Cellular, Inc. IS HEREBY DENIED.

11. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

Kevin J. Kelly

Chief, Mobile Serivces Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.917(a)(2) states that "[r]esources used to demonstrate an applicant's financial ability .cannot include funds committed to another project, or committed in another cellular application."

[2] SMTS calculates that Augusta and Saginaw together require $1,870,000, which is greater than Palmer's secured loan limit of $1,192,500. Furthermore, SMTS points out that Palmer's letter does not specifically require the provision of collateral for the cellular loan, so that the unsecured loan limit may be the maximum Palmer is able to lend.

[3] The Alliance also alleges that Intercontinental's application is defective because the Cellular Geographic Service Area (CGSA) extends into an adjacent MSA and its amendment of March 31, 1986, substituting a different make of equipment, fails to specify the duplexers required for the single antenna system originally proposed. We find these allegations meritless. First, *de minimis* CGSA extensions into other than central MSAs do not render an application defective. *See Order on Reconsideration*, FCC 86-42, Mimeo No. 3644, released January 24, 1986, at para. 3. Second, Intercontinental's amendment proposes both transmit and receive antennas and thus, duplexers are not required.

[4] *See supra*, note 3.

[5] The Commission has stated that the "reasonable assurance" standard would be applied in Round IV markets and that the tentative selectee's application would be carefully reviewed to ensure this standard. *Cellular Radio Service (Lottery Selection)* 58 Rad. Reg. 2d (P&F) 677, 686-687 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

File No. ENF-86-11

CERTIFICATION BY THE
UTAH PUBLIC SERVICE
COMMISSION CONCERNING
REGULATION OF CABLE
TELEVISION POLE ATTACHMENTS

ORDER

Adopted October 1, 1986 ; Released October 6, 1986

By the Common Carrier Bureau:

1. On April 18, 1986, the Utah Cable Television Association ("UCTA") filed a Petition for Declaratory Ruling ("Petition") alleging that the State of Utah did not fulfill the pole attachment certification requirements of 47 U.S.C. § 224 and Commission regulations, 47 C.F.R. § 1.1414.

2. On September 23, 1986, counsel for UCTA filed a request for withdrawal of the Petition without prejudice. As support, UCTA states that it has reached a procedural accommodation with the Utah Public Service Commission, which temporarily obviates the need for an FCC ruling on the Petition. Because there is no current need to issue the requested ruling, we conclude that the proceeding should be terminated as requested.

3. Accordingly, pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, IT IS ORDERED that the above-captioned proceeding IS TERMINATED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-317

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Trenton, Georgia and South
Pittsburg, Tennessee [1]

RM-5053
RM-5180

REPORT AND ORDER

(Proceeding Terminated)

Adopted: September 24, 1986 ; Released: October 7, 1986

By the Chief, Policy and Rules Division:

1. The Commission considers herein the Notice of Proposed Rule Making, 50 FR 45133, October 30, 1985, proposing the allotment of Channel 247A to Trenton, Georgia, as that community's first FM service, at the request of Trenton Service Company, Inc.("Trenton Service"). Also being considered is the conflicting proposal filed by Marion County Broadcasting Service, Inc. ("Marion"), licensee of daytime-only AM Station WEPG, South Pittsburg, Tennessee, requesting the allotment of Channel 247C2 to South Pittsburg, as that community's first FM service. Initially the petition was filed as a counterproposal to the Further Notice of Proposed Rule Making in MM Docket No. 84-14, 50 FR 33607, August 20, 1985. However, the decision therein determined that it was not appropriate to consider such a request in the context of that proceeding.[2] Trenton Service filed supporting comments reaffirming its intention to apply for the channel at Trenton. Supporting comments were also filed by RA-AD of Trenton, Inc. ("RA-AD"), licensee of daytime-only AM Station WADX, Trenton, Georgia, in which it expressed an interest in applying for the FM channel at Trenton.

2. The proposals are mutually exclusive because the communities are separated by only 23.8 kilometers (14.8 miles) and the minimum distance separation requirements for co-channel Class A to C2 allotments is *3 kilometers* (101 miles). Therefore, we conducted a channel search to determine if an alternative channel was available to resolve the conflict between Trenton and South Pittsburg for Channel 247. Our engineering study reveals that the only other channel available to either community is Channel 274A at Trenton, thereby, permitting Channel 247C2 to be considered at South Pittsburg. Thus, we believe the public interest would be served by the allotments of Channel 247C2 to South Pittsburg, Tennessee, and Channel 274A to Trenton, providing each community with a first local FM service. Channel 247C2 can be allotted to South Pittsburg in compliance with the Commission's minimum distance separation requirements of Section 73.207 with a site restriction of 3.4 kilometers (2.1 miles) northeast of the city to avoid short spacing to the site specified in a construction permit for Station WRSA(FM), Channel 245, Decatur, Alabama. This allotment is contingent upon Station WRSA(FM), Channel 245, Decatur, Alabama receiving a license in accordance with an outstanding construction permit to increase its antenna height since its current site is short-spaced. Channel 274A at Trenton meets the minimum distance separation requirements. This allotment is contingent upon Station WYCQ(FM), Channnel 275, Shelbyville, Tennessee receiving a license to operate as a Class C1 facility. An application has been filed requesting the downgrade of its facility (BPH860326ID). The filing window dates for both channels will be announced at a future date to follow the licensing of Stations WRSA(FM) and WYCQ(FM), accordingly.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 12 , 1986, the FM Table of Allotments IS AMENDED with regard to the following communities:

City	Channel No.
Trenton, Georgia	274A
South Pittsburg, Tennessee	247C2

4. The window period for filing applications on Channel 247C2 at South Pittsburg and Channel 274A at Trenton, Georgia, will be announced at a later date.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Therefore, Public Notice of the South Pittsburg petition as a counterproposal herein was given on December 6, 1985, Report No. 1556.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-319

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-5054
FM Broadcast Stations.
(Hondo, Texas)

REPORT AND ORDER

(Proceeding Terminated)

Adopted: September 25, 1986 Released: October 7, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Notice of Proposed Rule Making, 50 FR 43743, October 29, 1985, proposing the allotment of Channel 253A to Hondo, Texas, as that community's first FM channel. The Notice was issued in response to a petition filed by DLB Broadcasting Corporation ("petitioner"). Petitioner submitted supporting comments reiterating its intention to apply for the channel and provided pertinent information as requested in the Notice. Comments were also filed by Atascosa Broadcasting Co., Inc., ("Atascosa") licensee of Station KBOP-FM, Pleasanton, Texas and National Enterprises, Inc., ("National") licensee of AM Station KDRY, Alamo Heights, Texas.[1]

2. Channel 253A can be allotted to Hondo in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.4 kilometers (7.1 miles) south of the community. This restriction is necessary to avoid short spacing to FM Station KHLC, Bandera, Texas (Channel 252A). As stated in the Notice, a site this far removed from the center of the city may prove difficult to provide a city-grade (70 dBu) signal over the entire community. Therefore, the petitioner or other interested parties were requested to provide information that a site is available which would provide such coverage. Since Hondo is located within 320 kilometers (199 miles) of the U.S. Mexican border, concurrence of the Mexican government has been obtained.

3. In its comments petitioner has adequately shown that it has found a suitable site which will meet all minimum mileage separation and place a city grade signal over Hondo. Our staff has confirmed this showing.

4. Atascosa, in its comments, suggests that petitioner should reconsider its request and seek another channel for Hondo because the proposed site, as indicated in petitioner's initial petition, is extremely close to two first adjacent channels at Pleasanton and Bandera, Texas.

5. National supports the Hondo allotment but suggests an unacceptable counterproposal[2] in order to eliminate the possible difficulty with Channel 253A providing a city grade signal to the community from the restricted site.

6. The Commission's site restriction of 11.4 km south of the community would meet the concern about compliance with the separation requirements. Further, the petitioner's statement as to the availability of a site is adequate. In view of the foregoing, the Commission believes that the public interest would be served by the alotment of FM Channel 253A to Hondo, Texas, thereby providing that community with its first FM service.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 12 , 1986, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No
Hondo, Texas	253A

8. The window period for filing applications will open on November 13, 1986, and close on December 15, 1986.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Capitol Cities Broadcasting Corporation submitted late-filed comments, which we have not accepted for consideration.

[2] The counterproposal was unacceptable because it required the substitution of the channel recently granted to Pearsall, Texas in the First Report and Order in MM Docket No. 84-231, 50 FR 3514, January 25, 1985. The Commission decided that such allotments would not be the subject of a substitution unless the Commission's original decision was in error or a compelling need for the substitution is demonstrated. See Memorandum Opinion and Order in MM Docket No. 84-231, 50 FR 47391, November 18, 1985. On August 25, 1986, the Commission adopted a subsequent Memorandum Opinion and Order in MM Docket No. 84-231, which will permit substitutions of the 84-231 allotments after the filing windows are closed provided the new channel meets the spacing requirements to each applied for site as of the date the petition is submitted. Here, the Pearsall channel is No. 33 on the list of channels for the window process. We could consider a petition proposing a substitute channel at Pearsall after the No. 33 window has been closed for application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-343

In the Matter of

Amendment of Section 73.202(b), RM-5001
Table of Allotments,
FM Broadcast Stations,
(Mt. Vernon, Illinois)

REPORT AND ORDER

(Proceeding Terminated)

Adopted: September 25, 1986 Released: October 7, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 50 Fed. Reg. 49076 published November 29, 1985, proposing the allotment of Channel 271B1 to Mt. Vernon, Illinois, as that community's second FM service. The Notice was adopted in response to a petition filed by Midwest Radio Consultants, Inc. ("petitioner"). The petitioner submitted supporting comments reaffirming its interest in the channel.

2. Channel 271B1 can be allocated to Mt. Vernon in compliance with the provisions of Section 73.207 of the Rules with a transmitter site restriction of 21.3 kilometers (13.2 miles) Northwest of the City to avoid short spacing to Station WGEL, Greenville, Illinois (Channel 269A) and to Station WDRW(FM) Eldorado, Illinois (Channel 272A). The allotment of Channel 271B1 to Mt. Vernon is conditioned on Station WEZK(FM), St. Louis, Missouri, relocating its transmitter site and becoming a full Class C facility in accordance with the construction permit granted to that station (BMPH 840917AU). This change in site would alleviate a current short spacing to the licensed site of Station KEZK. Therefore, we believe it is necessary to delay the filing window until a future date. Accordingly, the filing dates for Channel 271B1 will be announced at a future date to follow the licensing of Station KEZK at the new location.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 12 , 1986, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the community listed below:

City	Channel No.
Mt. Vernon, Illinois	231, 271B1

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-35

In the Matter of

Amendment of Section 73.202(b),	RM-5134
Table of Allotments,	RM-5377
FM Broadcast Stations,	
(Trinity and Rogersville,[1]	
Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 25, 1986 Released: October 7, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Notice of Proposed Rule Making, 51 FR 4935, February 10, 1986, which invited comments on the request of Dorsey Eugene Newman ("petitioner") to allot FM Channel 223A to Trinity, Alabama, as that community's first local broadcast service. Radio Rogersville ("RR") filed comments and a counterproposal requesting that Channel 223A be allotted to Rogersville, Alabama, as that community's first local broadcast service.[2] Supporting comments were filed by petitioner as well as RR,[3] both of whom also filed reply comments.[4]

2. Trinity (population 1,328)[5] and Rogersville (population 1,224) are located approximately 26 kilometers apart, whereas a separation of 105 kilometers is required in this instance. Thus, the proposals are mutually exclusive. However, in an effort to accommodate the desires expressed herein, rather than deprive a first local service to either community based on a comparative evaluation, a staff channel study was performed. As a result, we have determined that Channel 223A is the only channel available to Trinity while Channel 230A may be allotted to Rogersville. In this manner, both communities can receive a first local FM service.

3. As indicated in the Notice, Channel 223A can be allotted to Trinity consistent with the minimum spacing requirements of Sec.73.207(b) of the Commission's Rules. However, the proposed allotment of Channel 230A at Rogersville requires a site restriction 11.3 kilometers (7.0 miles) north of the community to avoid short-spacing to the site specified in a pending application filed by Station WDJC(FM) (Channel 229)(BPH860311IG), Birmingham, Alabama, to upgrade its facilities to maintain its Class C status. The channel is currently short-spaced to the Birmingham station's licensed site. Thus, Channel 230A at Rogersville can be allotted contingent upon the grant of a license to cover the construction permit at the proposed site of Station WDJC(FM). Consequently, the filing window period for Channel 230A at Rogersville will be announced at a future date following the licensing of Station WDJC(FM) accordingly.

4. In view of the above, we believe the allotment of Channel 223A to Trinity, Alabama, and Channel 230A to Rogersville would fulfill the public interest by providing each community with a first local broadcast service. Therefore, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 12, 1986, the FM Table of Allotments, Section 73.202(b) of the Commission 's Rules, IS AMENDED to include the communities listed below, as follows:

City	Channel No.
Rogersville, Alabama	230A
Trinity, Alabama	223A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 223A at Trinity, Alabama, will open on November 13 , 1986, and close on December 15.1986. However, the window period for filing applications on Channel 230A at Rogersville, Alabama, will be announced at a later date following issuance of a license to cover the construction permit of Station WDJC(FM), Birmingham, Alabama, to operate as a Class C facility.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of the counterproposal was given April 11,1986, Report No.1580.

[3] RR alleges that petitioner failed to file comments in support of his proposal. However, such comments were, in fact, timely received. Therefore, additional pleadings filed concerning this issue warrant no discussion.

[4] Petitioner's reply was filed late and RR opposes its acceptance. Since petitioner has provided us with no justifiable reason for his tardiness, his comments are unacceptable for filing.

[5] Population figures are taken from the 1980 U.S. Census.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-73

In the Matter of

Amendment of Section 73.606(b),
Table of Assignments,
Television Broadcast Stations,
(Grand Island, Nebraska)

REPORT AND ORDER

(Proceeding Terminated)

Adopted: September 26, 1986 ; Released: October 7, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Notice of Proposed Rule Making, 51 Fed. Reg. 7463, published March 4, 1986, proposing, on our own motion, to change the offset on Channel 17 at Grand Island, Nebraska, om it from its current "minus" designation to zero" designation. No comments on the proposal were received.

2. In processing the application of Family Broadcasting Co., Inc. for a new television station on Channel 17- at Grand Island,[1] the staff discovered that this assignment has the same offset as the closest co-channel assignment (Channel 17-, Sioux Falls, South Dakota) for which a construction permit has also been granted to Family Broadcasting Co., Inc. to operate Station KTTW. The change in offset designation at Grand Island would avoid objectionable interference between the two stations.

3. We believe the public interest would be served by adopting the offset designation change at Grand Island. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That Section 73.606(b) of the Commission's Rules, the Television Table of Assignments, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Grand Island, Nebraska	11-, 17

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Family Broadcasting Co., Inc. for UHF TV Station KTVG, Grand Island, Nebraska, IS MODIFIED effective November 12 , 1986, to specify operation on Channel 17 with a zero offset in lieu of its present minus offset, subject to the following conditions:

(a) The permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facilities.
(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.20.
(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Family Broadcasting Co.,permittee of Station KTVG, 105 W. Jefferson, Fairfield, Iowa 52556.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] A construction permit has since been issued to Family Broadcasting for this channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELENET COMMUNICATIONS CORP.

File No. I-T-C-86-161

Application for authority to
acquire and operate facilities
for telex service to Italy

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 29, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on August 13, 1986 by Telenet Communications Corp. (Telenet), requests authority to lease and operate satellite and connecting facilities for direct telex service to Italy. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct telex service to Italy by Telenet.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-161 IS GRANTED, and Telenet is authorized to:

a. lease from Comsat and operate one satellite voice circuit between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Italy, furnished by Telenet's correspondent in Italy;
b. lease and operate one voice circuit between the east coast earth station and Telenet's Reston, Virginia operating office; and
c. use the facilities authorized herein to provide telex service between the U.S. and Italy and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Telenet and its correspondent in Italy, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC.

File No. I-T-C-86-162

Acquire and Operate facilities
for direct service to Portugal

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 29, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on August 14, 1986 by TRT International, Inc. (TRTI), requests authority to acquire. activate, reassign and operate cable and connecting facilities for service to Portugal. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Portugal by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-162 IS GRANTED, and TRTI is authorized to:

a. lease and operate five voice circuits between Green Hill, Rhode Island and its New York City office and one voice circuit between Tuckerton, New Jersey and its New York City office;
b. acquire by IRU three whole circuits and one half circuit in the TAT-6 cable;
c. reassign for service to Portugal one whole circuit in the TAT-6 cable owned by TRT Telecommunications Corp. (TRT), now assigned for service to Sweden;
d. make available to its correspondent in Portugal one-half interest in four circuits in the TAT-6 cable;
e. acquire by IRU a one-half interest in and operate five voice circuits in the TAGIDE cable between France and Portugal; and
f. use these facilities, in conjunction with one previously authorized voice circuit in the TAT-7 and United Kingdom-Portugal cables owned by TRT and facilities furnished by its correspondent in Portugal, to provide TRTI's regularly authorized services between the U.S. and Portugal and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Portugal, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of IRU agreements between TRTI and its correspondent in Portugal. and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO.

File No. I-T-C-86-164

Application for authority to acquire
and operate facilities for service
to Hong Kong and Singapore

ORDER AND AUTHORIZATION

Adopted: September 29, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on August 15, 1986 by American Telephone and Telegraph Co. (AT&T), requests authority to acquire and operate facilities for regularly authorized services to Hong Kong and Singapore. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-164 IS GRANTED, and AT&T is authorized to:

a. acquire by IRU from its correspondent in Japan (KDD) a one-half interest in and operate 12 voice circuits in the OLUHO cable system;
b. acquire by IRU from its correspondent in Australia (OTCA) a one-half interest in and operate three voice circuits in the Okinawa-Luzon segment of the OLUHO cable system;
c. acquire by IRU from OTCA a one-half interest in and operate 15 voice circuits in the Guam-Okinawa segment of the Transpac-2 cable system; and
d. use said facilities to provide AT&T's regularly authorized services between the U.S. on the one hand, and Hong Kong and Singapore, on the other hand, and beyond.

3. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of IRU agreements between AT&T and KDD and OTCA, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RCA AMERICAN COMMUNICATIONS, INC.

File No. I-T-C-86-086

Application for authority to provide INTELSAT Business Services between the United States, on the one hand, and Grand Turk, Turks and Caicos Islands, on the other hand.

File No. CSG-86-054-P/L

Application for authority to construct and operate an international earth station at Miami, Florida for provision of INTELSAT Business Services.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: September 29, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The Commission has under consideration the captioned applications filed on April 15, and May 16, 1986, respectively, by RCA American Communications, Inc. (RCA Americom), requesting authority, pursuant to Title III and Section 214 of the Communications Act of 1934, 47 U.S.C. Title III, § 214 (1976), and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, 47 U.S.C. § 721(c)(4), (6) and (7) (1978), to construct and operate a 6/4 GHz earth station at Miami, Florida for provision of INTELSAT Business Services (IBS). The latter application was supplemented by letter of July 16, 1986. The applications were placed on public notice on April 23, and May 29, 1986, respectively. No comments were received.

2. The proposed earth station will consist of a nominal 13 meter antenna communicating with INTELSAT satellites in the 6/4 GHz band. The station will be located on U.S. Government property at Miami, Florida and will be used to provide the government with a full range of IBS services between the United States, on the one hand, and Turks and Caicos Islands, on the other hand.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[1] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[2] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[3]

4. RCA Americom has the legal, technical, and financial qualifications to construct and operate the proposed earth station. RCA Americom is a common carrier pursuant to Section 214 of the Communications Act, and provides both domestic and international communications services. The proposed earth station complies with INTELSAT criteria for IBS stations. The applicant has completed the required frequency coordination. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS/television authorizations. We will limit the authorization to the provision of IBS/television and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

5. Upon consideration of the applications, we find that authorization of the proposed facilities and services is in the public interest.

6. IT IS CERTIFIED that the public convenience and necessity require the provision by the applicant of the present and future IBS space segment between the proposed earth station and Turks and Caicos Islands via appropriate INTELSAT satellites. We also find that the public convenience and necessity require the construction and operation of the proposed earth station.

7. Accordingly, IT IS ORDERED pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, and Section 201(c) of the Communications Satellite Act of 1962, that applications File Nos. I-T-C-86-086 and CSG-86-054-P/L ARE GRANTED, and RCA Americom is authorized to:

a. establish channels of communication between its proposed earth station at Miami, Florida, and INTELSAT satellites for the provision of IBS services between the U.S. and Grand Turk, Turks and Caicos Islands; and

b. construct and operate the proposed earth station facilities at Miami, Florida.[4] Before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of installed equipment.

8. The Section 214 authorization granted herein is effective on the release date of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires that a new application be filed. Should the Commission require that a new application be filed, the authorization will continue in effect until Commission action on the application.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure non-discriminatory use of, and equitable access to the communications satellite system.

10. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between RCA and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

11. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[3] *See* the cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[4] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OVERSEAS TELECOMMUNICATIONS, INC.

File No. I-T-C-86-163

Application for authority to establish channels of communication between the U.S. and INTELSAT satellites for provision of international television service

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 30, 1986 **Released: October 8, 1986**

By the Common Carrier Bureau:

1. We have before us an application, filed on August 14, 1986 by Overseas Telecommunications, Inc. (OTI), requesting authority, pursuant to Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, to establish and operate channels of communication between the U.S. and INTELSAT satellites for provision of international television services. The applicant states that it wishes to use existing earth stations or construct new earth stations for which authority will be sought pursuant to Title III of the Communications Act. The application was placed on public notice on August 20, 1986. No comments were received.

2. OTI requests the same blanket authority to provide international television services as we have granted to other carriers.[1] OTI has the requisite qualifications to provide television service to overseas points where television service has been introduced. A grant of blanket authority here would be consistent with previous Commission decisions and in the public interest.

3. IT IS CERTIFIED that the present and future public convenience and necessity require the provision by OTI of the television space segment between television earth stations that are now or may be licensed to them in the future and appropriate INTELSAT satellites.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-86-163 IS GRANTED, and OTI is authorized to establish channels of communication between U.S. earth stations and appropriate INTELSAT satellites for the provision of television services between the U.S. and those countries that now are or hereafter will be listed in Comsat's tariff provisions for the space segment component of television service. Provided, however, that this blanket Section 214 authorization is without commitment as to the Commission's action on any international television earth station Title III applications that applicant has filed or may file in the future.

5. The Section 214 authorization granted herein is effective on its release date of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

7. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondisciminatory use of, and equitable access to, the communications satellite system.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *AT&T et al.*, 18 FCC 2d 402 (1969) and *ITT WC et al.*, 76 FCC 2d 26 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FAIRCHILD COMMUNICATIONS NETWORKS MANAGEMENT CO.

File No. I-T-C-86-159

Application for authority to establish channels of communication between the U.S. and overseas points via INTELSAT satellites for provision of INTELSAT Business Services

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: September 30, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on August 13, 1986, by Fairchild Communications Networks Management Co. (FCNM), requesting authority, pursuant to Section 214 of the Communications Act of 1934, to establish and operate channels of communication between the US and INTELSAT satellites for provision of INTELSAT Business Services (IBS). FCNM states that it will use existing earth stations or construct new IBS earth stations for which authority will be sought pursuant to Title III of the Communications Act. The application was placed on public notice on August 20, 1986. No comments were received.

2. FCNM requests the same blanket authority to provide IBS services that we have granted to other carriers.[1] FCNM has the requisite qualifications to provide IBS service to overseas points where IBS has been introduced. A grant of blanket authority here would be consistent with previous Commission decisions and in the public interest.

3. IT IS CERTIFIED that the present and future public convenience and necessity require the provision by FCNM of the IBS space segment between IBS earth stations that are now or may be licensed to them in the future and appropriate INTELSAT satellites.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-86-159 IS GRANTED and FCNM is authorized to establish channels of communication between U.S. earth stations and appropriate INTELSAT satellites for the provision of IBS and related digital video services between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or digital video services. Provided, however, that this blanket Section 214 authorization is without commitment as to the Commission's action on any IBS earth station Title III applications that the applicant may file in the future.

5. The Section 214 authorization granted herein is effective on its release date of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of its execution.

7. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] For IBS services, see Vitalink International Communications, Inc., Mimeo No. 687 (released November 7, 1984). See also, Communications Satellite Corporation, Mimeo No. 6564 (released September 14, 1984), and American Telephone and Telegraph Co. *et al.*, File Nos. I-T-C-85-035, *et al.*, released March 18, 1985.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY File No. I-T-C-86-105

For authority pursuant to Section 214 of the Communications Act to establish and operate satellite channels of communication between points in the United States mainland and points in the Caribbean Region, Central America, Mexico, and Canada

THE WESTERN UNION TELEGRAPH COMPANY File No. I-T-C-86-085

For authority pursuant to Section 214 of the Communications Act to utilize Westar satellite capacity for one-way communication from the United States to various points in the Caribbean area

ATLANTIC SATELLITE COMMUNICATIONS, INC. File No. I-T-C-86-119

For Section 214 authority to establish and operate channels of communications from points in the United States and Canada and other INTELSAT coordinated points as established under Article XIV(d) coordination

ATLANTIC SATELLITE COMMUNICATIONS, INC. File No. 1551-DSE-MP/L-85

Application for modification of its domestic license for a fixed transmit/receive earth station (E4626) at Northvale, New Jersey to permit communications to transborder locations

DETROIT EDUCATIONAL TV FOUNDATION File No. 1718-DSE-ML-86

Application for modification of its domestic license for a fixed satellite earth station (WF67) at Avon Township, Michigan to permit communications with ALSAT and ANIK satellite systems

RCA AMERICAN COMMUNICATIONS, INC. File No. I-T-C-86-144

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to make available television channels of communication via the RCA Americom satellite Satcom III-R connecting to receive earth stations located in various overseas locations

RCA AMERICAN COMMUNICATIONS, INC. File No. I-T-C-86-147

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to make available audio channels of communication via the RCA Americom satellite Satcom IV connecting to receive earth stations located in various overseas locations

THE HEARST CORPORATION File Nos. 1952-DSE-ML-86, 1953-DSE-ML-86, 1954-DSE-ML-86, 1955-DSE-ML-86, 1956-DSE-ML-86, 1957-DSE-ML-86

Applications for authority to modify existing licenses for its transportable earth stations located at Baltimore, Maryland (E860019), Boston, Massachusetts (E8046), Dayton, Ohio (E860002), Kansas City, Missouri (E850398), Milwaukee, Wisconsin (E859661) and Pittsburgh, Pennsylvania (E860003) to permit communications with the SBS 3, ANIK and other Ku-band domestic satellites for U.S.-Canada service

MEMORANDUM, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The Commission has under consideration the above-captioned applications requesting authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, to provide service via domestic satellites between the U.S. and Canada, Mexico and Latin America/Caribbean locations.

2. The applications were placed on the Commission's public notice. Communications Satellite Corporation (Comsat) filed comments in response to the American Telephone and Telegraph Co. (AT&T) application.

I. The Applications

3. *AT&T (File No. I- T-C-86-105).* AT&T is a common carrier and licensed domestic satellite system operator. AT&T requests authority to establish and operate channels of communication using its domestic satellite system for the provision of receive-only and other services between points in or reached via the U.S. mainland and points in the Caribbean region, Central America, Mexico and Canada.[1] AT&T also requests authority to permit its SKYNET Transponder Service to be received at earth stations in specified transborder locations. Specifically, it requests authority to use its TELSTAR 301, TELSTAR 302 and TELSTAR 303 satellites to provide receive-only and other services (two-way services between the U.S., Canada and Mexico).

4. *Western Union Telegraph Co. (File No. I-T-C-86-085).* Western Union is a common carrier licensed to operate the Westar domestic satellite system. In its application, Western Union requests .authority to use Westar satellite capacity to provide one-way communications from the United States to various points in the Caribbean. Western Union proposes to provide service via the Westar IV,

Westar V and the Westar III satellite referred to a USASAT 3C in the INTELSAT Article XIV(d) consultation.[2] Specifically, Western Union requests authority to provide one-way television, audio and data services to specified locations.[3] Western Union contends that a grant of its application will help Westar users to expand the audience for their satellite delivered programming by adding cable systems and television stations in the Caribbean basin.

5. *Atlantic Satellite Communications, Inc. (ASCI)* (*File. No. I-T-C-86-119 and* . 1551- *DSE-MP/L-86*). ASCI is the licensee of a domestic satellite earth station (E4626) at Northvale, New Jersey with both a C-band and a Ku-band antenna which ASCI proposes to use to provide transborder services. ASCI requests authority to provide television, audio and data transmissions between the U.S. and Canada and other transborder locations for which consultation with INTELSAT under Article XIV(d) has been completed.[4] Thus, ASCI seeks a modification of its domestic license to permit such service.

6. *Detroit Educational Television Foundation (DETV), (File No. 1718-DSE-ML-86.* DETV is the licensee of a domestic fixed satellite earth station (WF61) at Avon Township, Michigan. DETV requests modification of its license to permit transmission and/or reception of video programming between the U.S. and Canada via all U.S. domestic satellites and the Canadian ANIK satellite system.

7. *RCA Americom (File Nos. I-T-C-86-144 and I-T-C-86-147).* In application File No. I-T-C-86-147 RCA Americom requests authority to make available audio channels of communication via the Satcom IV satellite to receive earth stations in various transborder locations.[5] The facilities will be used to extend to transborder locations the programming of Misterio Radial Cristo Vune Pronto, Inc. which transmits Spanish language educational FM radio programming to operators of receive earth stations.

8. In application File No. I-T-C-86-144 RCA Americom requests authority to make available television channels of communication via the Satcom III-R satellite to receive earth stations in various transborder locations.[6] The channels will be used to extend to transborder locations the programming of Viacom International, Inc. which transmits programming to operators of receive earth stations.

9. *The Hearst Corporation (Hearst), File Nos. 1952-DSE-ML-86, 1953-DSE-ML-86, 1954-DSE-ML-86, 1955-DSE-ML-86, 1956-DSE-ML-86 and 1957-DSE-ML-86.* Hearst is the licensee of domestic transportable earth stations located at Baltimore, Maryland (E860019), Boston, Massachusetts (E8046). Dayton, Ohio (E860002), Kansas City, Missouri (E850398). Milwaukee, Wisconsin (E859661), and Pittsburgh, Pennsylvania (E860003). These earth stations are currently operating under temporary authority pending issuance of a regular license. In the instant applications Hearst requests a modification of its temporary licenses for these stations to permit direct television communications with Canadian broadcast stations and customers. Hearst proposes to provide service using the SBS 3, ANIK, and other Ku-band domestic satellites.

II. Positions of the Parties

10. In its comments in response to the AT&T application, Comsat states that it does not object to the grant of the application insofar as it is consistent with existing INTELSAT Article XIV(d) consultations. To the extent that the application may encompass services which have not been consulted, Comsat argues that a new Article XIV(d) consultation will be required. Also, Comsat objects to AT&T's statement that the transborder procedures do not and should not apply in this case. Comsat notes that this argument was raised previously by AT&T and rejected by the Commission.

III. Discussion

11. The applications before us involve service proposals that are for the most part repetitions of the many applications that we have authorized consistent with our Transborder policy. For the reasons that follow, we find that final grant of these applications which propose service consistent with current INTELSAT Article XIV(d) consultations is in the public interest.

12. In 1981 the Commission, after consultation with the State Department, issued its initial transborder decision which set forth the policy governing the use of domestic satellites for certain international telecommunications services.[7] In its *Transborder I* decision, the Commission, determined that domestic satellites could be used for international public telecommunications services where: (a) INTELSAT facilities are incapable of providing the service; or (b) it would be uneconomical or impractical to use the INTELSAT system.[8] The Commission found that use of domestic satellites for the provision of certain international communications services was not barred by U.S. policy, was consistent with the 1962 Satellite Act and the INTELSAT Agreement, and was consistent with its policy concerning the use of domestic satellites.

13. Although it determined that INTELSAT facilities were capable of providing the services in some instances, the Commission in the *Transborder I* decision found that it would be uneconomical and impractical for U.S. programmers/distributors to use the global system for the proposed transborder video services. That finding was based on the fact that the programming sought to be extended was already being transmitted over domestic satellites whose "footprints" included nearby countries and the extension of that programming to small, low-cost, receive-only earth stations in those countries would involve no significant additional costs. The alternative method of using INTELSAT facilities would involve significant additional costs due to multi-satellite hops and the use of additional terrestrial facilities. In addition, the Commission found that the use of the INTELSAT system to duplicate programming already available on domestic satellites would be an inefficient use of the available radio spectrum.

14. The Commission made similar findings with respect to the business services between the U.S. and Canada.[9] The Commission noted that the global system has not been used for traffic between the U.S. and Canada. Although the U.S. INTELSAT earth stations at Etam, West Virginia and Andover, Maine could transmit and receive traffic over the INTELSAT Atlantic Ocean Region (AOR) satellite, the Commission found that service via INTELSAT would be uneconomical and impractical since it would involve 1) higher costs necessary to duplicate networks already in place; 2) higher costs and inefficiency associated with multi-satellite hops and terrestrial links which would be required to extend transmission to a customer's premises; and 3) an inefficient use of the available radio spectrum. Moreover, the Commission noted that the coverage of the AOR satellite footprint did not

include the Central United States or Central, Northern or Western provinces. The Commission specified, however, that none of the services authorized could be implemented until (a) the concurrence of the appropriate governmental entities had been obtained; (b) the consultations requirements of INTELSAT Article XIV(d) had been complied with; and (c) the Chief, Common Carrier Bureau issued an order authorizing the implementation of service.

15. All of the prerequisites for the issuance of final authorization have been completed with respect to the instant applications. In connection with previous transborder applications, the State Department consulted with appropriate foreign governmental officials which culminated in the successful completion of the INTELSAT Article XIV(d) process for transborder services to U.S.-Canada, U.S.-Mexico and U.S.-Latin America/Caribbean locations. A summary of these consultations is attached. The instant applications are similar, if not identical, to previous applications found to be in the public interest. These applications are also consistent with the INTELSAT Article XIV(d) consultations which have been completed. Therefore, we find that the instant applications are consistent with our Transborder policy and that their grant will serve the public convenience and necessity.[10]

16. Accordingly, IT IS ORDERED that the applications of AT&T (File No. I-T-C-86-105), Western Union (File No. I-T-C-86-085), ASCI (File Nos. I-T-C-86-119 and 1551-DSE-M-P/L-85), DETV (File No. 1718-DSE-ML-86), RCA Americom (File Nos. I-T-C-86-144 and I-T-C-86-147) and The Hearst Corporation (File Nos. 1952-DSE-ML-86; 1953-DSE-ML-86; 1954-DSE-ML-86; 1955-DSE-ML-86; 1956-DSE-ML-86 and 1957-DSE-ML-86 ARE GRANTED consistent with Attachments 1 and 2, and may be implemented without further action by this Commission.

17. IT IS FURTHER ORDERED that the final nature of this authorization only encompasses those satellites, services and countries listed in Attachments 1 and 2.

18. IT IS FURTHER ORDERED that the authorization to The Hearst Corporation shall be subject to the same terms and conditions contained in its temporary licenses.

19. IT IS FURTHER ORDERED that temporary authority (I-T-C-86-085/T-1) granted to Western Union is hereby cancelled and superseded.

20. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by the other country involved.

21. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

22. This order is issued under Section 0.291 of the Commission's Rules on Delegations of Authority and is subject to review under Section 1.115 of the Rules on Practice and Procedure. Review by the full Commission may be requested within 30 days of the date of public notice of this order (see Commission Rule 1.4(b)(2)) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail in time to be received by the due date.

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] AT&T proposes service to: Anguilla; Antigua and Barbuda; Bahamas; Belize; Bermuda; British Virgin Islands; Canada; Cayman Islands; Costa Rica; Dominica; Dominican Republic; El Salvador; Grenada; Guatemala; Haiti; Honduras; Jamaica; Mexico; Netherlands Antilles; Panama; St. Christopher-Nevis; St. Lucia; St. Vincent and the Grenadines; and Trinidad and Tobago.

[2] This Westar III satellite will be replaced at 91 W.L. by the Westar VI-S satellite.

[3] Western Union's service request is limited to Anguilla, Antigua, Aruba, Barbados, Dominica, El Salvador, Grenada, Guatemala, Honduras, Netherlands Antilles, St. Christopher-Nevis, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago since it has already received similar authority for service to Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Dominican Republic, Haiti, Jamaica, Mexico, Panama, and St. Kitts-Nevis.

[4] ASCI proposes service to all locations listed in Attachment 2.

[5] RCA Americom proposes service to the following locations: Antigua; Bahamas; British Virgin Islands; Canada; Cayman Islands; Colombia; Costa Rica; Dominica; Dominican Republic; El Salvador; Grenada; Guadalupe; Guatemala; Haiti; Honduras; Jamaica; Martinique; Mexico; Montserrat; Netherlands Antilles (Aruba, Bonaire, Curacao, Saba, Saint Eustatius, Saint Martin); Nicaragua; Panama; Saint Christopher-Nevis-Anguilla; St. Lucia; St. Vincent; and Turks and Caicos Islands.

[6] *Id.*

[7] Transborder Satellite Video Services, 88 FCC 2d 258 (1981) (Transborder I). See also American Satellite Co., 88 FCC 2d 178 (1981) and Satellite Business Systems, 88 FCC 2d 195 (1981).

[8] See letter from Under Secretary of State James L. Buckley, Department of State to Chairman Mark Fowler, Federal Communications Commission, dated July 23, 1981.

[9] Business services include data and electronic document distribution, video teleconferencing and private line voice communications. See American Satellite Co., 88 FCC 2d 178 (1981) and Satellite Business Systems, 88 FCC 2d 195 (1981).

[10] We note that the RCA Americom applications propose service to some points which have not been consulted under Article XIV(d). Thus, our authorization for service to these countries is conditioned on completion of the procedure specified in paragraph 14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE &
TELEGRAPH CO. File No. I-T-D-86-002

Application for authority to
discontinue operation of the TAT-3
cable

ORDER AND CERTIFICATE

Adopted: September 29, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on July 15, 1986 by American Telephone and Telegraph Co. (AT&T), requesting authority, pursuant to Section 214 of the Communications Act of 1934, to permanently discontinue operation of the TAT-3 Transatlantic Submarine Cable System located between Tuckerton, New Jersey and Widemouth, England. The application was placed on public notice on July 23, 1986. No comments were received.

2. The TAT-3 cable consists of a single submarine cable with rigid two-way repeaters laid on the floor of the Atlantic Ocean between Tuckerton, New Jersey and Widemouth, England. The system has a capacity of 138 voice-grade circuits. AT&T entered into the "Transatlantic Cable Construction and Maintenance Agreement" establishing the TAT-3 cable on July 20, 1960 with the British Post Office (now British Telecommunications-BT). The agreement provided for a service life of 25 years ending in July 1985. AT&T subsequently agreed to leave the cable in service until December 1986, but the cable failed in June 1986 and has been out of service since that time. AT&T has notified all US carriers holding IRU interests in the TAT-3 cable of the plan to deactivate the cable.

3. It is clear that the TAT-3 cable has reached the end of its useful service life and that substitute transatlantic facilities are available offering greater capacity and a better quality of service. The permanent discontinuance of operation of the TAT-3 cable and the transfer of service to more modern facilities can be accomplished with no discontinuance, reduction or impairment of service to any community or part of a community now served by TAT-3.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by AT&T of the TAT-3 cable and the substitution of other transatlantic facilities.

5. Within 60 days after the release of this order, AT&T shall notify the Commission of the accounting treatment it intends to use in retiring the TAT-3 cable.

6. Upon discontinuance of use and operation of the TAT-3 cable, AT&T shall notify the Commission thereof and submit to the Commission for cancellation any submarine cable landing license it possesses covering the TAT-3 cable.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U.S. INTERNATIONAL RECORD CARRIERS

File No. USP-86-016-(W)

Joint Request for
Modification of Accounting
Rates for International
Direct Telex Service with
CEPT Countries

Released: October 8, 1986

ERRATUM

By the Common Carrier Bureau:

1. On September 12, 1986, the Common Carrier Bureau released a Memorandum Opinion and Order (Order), Mimeo 6864, granting the referenced joint request for modification of accounting rates for international telex service between the U.S. international record carriers (IRCs) and the countries belonging to the Conference Europeene des Postes et des Telecommunications (CEPT). By the Order, the Commission approved an agreement between the IRCs and the CEPT administrations establishing an accounting rate of SDR 1.14 per minute, divided 50/50 between the originating and terminating administrations, effective July 1, 1986. The Order contained certain errors which we now correct.

2. Note 1 of the Order is amended to read: "The US IRCs participating in the joint request are Western Union Telegraph Company; MCI International Telecommunications Corporation; Graphnet, Inc; FTCC McDonnell Douglas International Telecommunicatons Company; TRT Telecommunications Corporation; RCA Global Communications, Inc.; ITT World Communications, Inc., and GTE Telenet, Inc."

3. Paragraph 5 of the Order is amended to substitute "SDR 1.14 per minute" for "SDR 1.14 per word."

4. The Order is further amended to note that RCA Global Communications, Inc. (RCA) petitioned to withdraw complaints it had filed against TRT Telecommunications Corporation (TRT) and FTCC McDonnell Douglas International Telecommunications Company (FTCC).[1] The complaints concerned agreements concluded by TRT and FTCC with four CEPT administrations to account and settle in SDRs, prior to the agreement between the all the IRCs and the CEPT administrations as a body. The Commission has granted RCA's petition to withdraw its complaints. *RCA Global Communications, Inc. v. TRT Telecommunications Corporation*, Mimeo 5708, released July 11, 1986.

5. Accordingly, IT IS ORDERED that the Memorandum Opinion and Order, Mimeo 6864, IS CORRECTED as set forth above.

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball, Chief
International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] File Nos. E-85-49 and E-85-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-344

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-5060
FM Broadcast Stations.
(Newberry, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 24, 1986 Released: October 10, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Notice of Proposed Rule Making, 50 Fed. Reg. 49074, published November 29, 1985, proposing to allot Channel 263A to Newberry, Florida, as the community's first FM channel, at the request of Newberry Broadcasters ("petitioner"). Comments were filed by the petitioner and by Gardner Broadcasting, both stating their intention to apply for the channel.

2. The Commission believes that the public interest would be served by the allotment of Channel 263A to Newberry, Florida in order to provide a first FM service to the community. The channel can be allotted in compliance with the minimum distance separation requirements of Section 73.207 of the Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 17 , 1986, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

Community	Channel No
Newberry, Florida	263A

4. The window period for filing applications will open on November 18, 1986, and close on December 17, 1986.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-373

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-5042
FM Broadcast Stations.
(Harbor Beach, Michigan)

REPORT AND ORDER

(Proceeding Terminated)

Adopted: September 30, 1986 Released: October 10, 1986

By the Chief, Policy and Rules Division:

1. The Commission herein considers its Notice of Proposed Rule Making, 50 FR 51266, December 16, 1985, issued in response to a request filed by DCS Radio Associates ("petitioner"), permittee of Station WWTM, Channel 288A, Harbor Beach, Michigan, proposing the substitution of FM Channel 289C2 for 288A and modification of the permit accordingly. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 289C2 for Channel 288A at Harbor Beach, Michigan, since it could provide the community with its first wide area coverage FM service. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 15.8 kilometers (9.8 miles) northwest of the community. The site restriction will prevent a conflict with Station WJZZ, Channel 290B, Detroit, Michigan. Concurrence of the Canadian government has been obtained since Harbor Beach, Michigan, is located within 320 kilometers (200 miles) of the common U.S.-Canadian border.

3. We have authorized, in paragraph 5, a modification of petitioner's permit for Station WWTM, Harbor Beach, Michigan, to specify operation on Channel 289C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 17 , 1986, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below:

Community	Channel No.
Harbor Beach, Michigan	289C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the permit of Station WWTM, Harbor Beach, Michigan, IS MODIFIED to specify operation on Channel 289C2, subject to the following conditions:

(a) The permittee shall file with the Commission a minor change application for construction permit (form 301), specifying the new facility.
(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-309

In the Matter of

Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off of the Island of Puerto Rico.

Order

Adopted: October 3, 1986 **Released: October 10, 1986**

By the Chief, Common Carrier Bureau:

1. On July 18, 1986, the Commission released a Notice of Proposed Rulemaking (NPRM) in the above captioned proceeding, FCC 86-319, 51 Fed. Reg. 26562 (1986). In the NPRM, the Commission set forth certain tentative conclusions regarding the development of its policies and guidelines concerning applications for facilities to provide telecommunications service between the island of Puerto Rico and off-island points. The Commission's decision called for the filing of comments by August 25, 1986, and reply comments by September 15, 1986. The Chief, Common Carrier Bureau, twice extended these deadlines upon the showing of good cause.[1] These orders established that comments and reply comments to the NPRM must be filed by September 17, 1986 and October 8, 1986.

2. On October 1, 1986, All American Cables and Radio, Inc. (AACR), requested an extension of time until October 13, 1986 to file reply comments in this proceeding. AACR states that this extension of four business days is necessary to prepare adequate reply comments. AACR maintains that key management, technical and financial personnel will be unavailable for an entire week during the reply comment period, as they are required by company policy to attend annual budget review meetings. AACR also states that additional time is required to respond to a 200-page rate-of-return study included in the comments of the Puerto Rico Telephone Company (PRTC). AACR claims that the study involves issues which are inherently complicated. AACR further claims that it needs to consult with financial personnel in Puerto Rico as well as outside experts in order to respond to the study. Moreover, AACR contends that PRTC is in no position to complain of delay in this proceeding since: it would not be able to introduce equal access necessary for fair competition until the end of 1989 or thereafter; it has already attempted to delay the proceeding by introducing complicated rate-of-return issues; and it has previously exaggerated its ability to comply with filing deadlines in this proceeding.

3. On October 2, 1986, PRTC filed an opposition to AACR's request. PRTC claims that AACR has failed to provide good cause to justify its request which, if granted, would further delay the introduction of competition in off-island services. In response to AACR's statement that key personnel will be missing during the reply comment period, PRTC states that AACR has known since mid-August that it would be called upon to file reply comments during late September and early October. PRTC contends that AACR's failure adequately to plan for the preparation of reply comments is not an acceptable reason to delay the proceeding. Further, PRTC comments that, as it filed the study examining AACR's rate of return over seven weeks ago in a separate proceeding, the inclusion of this study in this proceeding provides no reason for extending the reply comment deadline.

4. We find that good cause has not been shown for the requested extension of time. In contending that key personnel shall be unavailable during the reply comment period, AACR offers no reason why delaying its budget meetings or otherwise rearranging its work schedule in order to comply with the filing deadline would be impracticable. Further, as PRTC points out, AACR has possessed an opportunity to analyze PRTC's rate-of-return study since mid-August, when it was filed in connection with another proceeding.[2] We find that, under these circumstances, the current 21-day reply comment period is adequate for AACR to file reply comments in this proceeding.

5. Accordingly, IT IS ORDERED that, pursuant to Sections 0.291 of the Commission's Rules and Regulations, 47 C.F.R. §§0.291 (1985), the request for extension of time by All American Cables and Radio, Inc. in the above-captioned proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] CC Docket No. 86-309, Mimeo 6474 (released August 20, 1986); CC Docket No. 86-309, Mimeo 6964 (released September 17, 1986).

[2] Attachment to Puerto Rico Telephone Company's Petition for Reconsideration, All America Cables and Radio, Inc., Tariff F.C.C. No. 1, Transmittal No. 131 (received August 13, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DELRAY CELLULAR ASSOCIATES

File No. 31467-CL-P-101-A-84

For authority to construct and operate new facilities in the Domestic Public Cellular Radio Telecommunications Service on frequency block A in the Beaumont-Port Arthur, Texas Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted October 2, 1986; Released: October 8, 1986

By the Common Carrier Bureau:

1. Mid-America Cellular Systems, Inc. ("Mid-America"), Port City Cellular Communications ("Port City"), and The Alliance have each filed a petition to deny the above-captioned application for the non-wireline construction permit in the Domestic Public Cellular Radio Telecommunications Service for the Beaumont-Port Arthur, Texas Metropolitan Statistical Area (Beaumont MSA). The application of Delray Cellular Associates ("Delray") was selected first in the lottery held for this market on February 24, 1986, and was announced as the tentative selectee in *Public Notice*, Report No. CL-86-104, released April 2, 1986. Delray filed a consolidated opposition to the three petitions to deny.

Financial Showings

2. Mid-America, Port City and The Alliance all challenge Delray's financial showing. Mid-America also challenges other aspects of Delray's cellular system proposal. Port City alleges that Delray's bank letter from Mercantile-Safe Deposit and Trust Company ("Mercantile") does not provide reasonable assurance that the bank will commit the necessary funding because it contains the contingency that "(t)he applicant shall submit a formal loan application to the Bank, and such application shall have been approved by the Bank's Executive Committee". Port City contends that the bank's letter is no different from that rejected by the Commission in *Post - Newsweek Stations of Florida ,Inc .*, 46 FCC 2d 647 (1974)., where the bank's letter described the loan as being "subject to approval of our loan committee". The Alliance insists that Delray should have submitted updated financial showings pursuant to Section 1.65, since its balance sheet and its bank letter are two years old and outdated. Mid-America questions whether the bank was familiar with the Delray or its principals, and speculates whether the bank understood the nature of the applicant itself. Mid-America also questions Delray's omission of debt service expense in its first-year operating expenses.

3. Delray responds that the objectionable language in the bank letter in *Post -Newsweek* was significantly different from that in the Mercantile letter, and, unlike in the Mercantile letter, the willingness of the bank to make the loan is not called into question. Delray contends that the condition in its bank letter merely "describes the formalities which the bank will require be accomplished before it can issue a legally binding commitment in anticipation of making the loan". Reasonable assurance that the loan would be made had already been given under the signatory's authority, asserts Delray (supported by an attached affidavit of the letter's signatory). It further asserts that that it has no obligation under Section 1.65 to provide updates to its showing of sufficient available financing or to its balance sheet. Delray states that there are no substantial and significant changes to that information. Delray also points out that its omission of the first-year debt service expense is irrelevant, because more than sufficient funding is committed by the bank to cover this expense over and above the first-year operating costs and the construction costs.

4. Upon close evaluation of the bank letter in its entirety, we find that it provides reasonable assurance of availabilty of financing for Delray's proposed cellular system. We established the reasonable assurance standard for fourth-round cellular applicants in the *Cellular Lottery Rulemaking*, 56 Rad.Reg. 2d (P&F) 8 (1984), *recon.* 58 Rad.Reg. 2d 677 (1985), *further recon.*, 59 Rad.Reg. 2d (P&F) 407 (1985). We have stated that a bank letter must meet the reasonable assurance test of *Multi-State Communications, Inc.*, 590 F. 2d 1117 (D.C. Cir. 1978), *cert.denied*, 440 U.S. 959 (1979) as set out in the *Order on Reconsideration*, FCC 86-40, Mimeo No. 36444, released January 24, 1986, at para. ,14. We stated there that the bank letter must identify the applicant, be market specific, and contain ,pertinent terms of the proposed loan. *Multi-State* also required that short of a final and binding commitment, the bank letter must indicate that there exists a present firm intention to make the loan. 590 F. 2d at 1120.

5. The bank letter set out the conditions for approval of the loan, which were that the applicant obtain the construction permit and that Delray remain under then-present control. The letter also identifies Delray as the applicant for the Beaumont MSA, and lists a number of terms including the specification of interest and collateral. We do not construe the step of making application for final approval as vitiating in any way the bank's willingness to make the loan. We conclude that the Mercantile bank letter does meet the Commission's reasonable assurance test.[1]

Other Issues

6. Mid-America questions whether the constituent partners of Delray participated meaningfully in the development of its proposal, because at least three of them appear to be practicing physicians in the Washington, D.C. area. In addition, Mid-America finds Delray's demand assessment flawed in that the allocation of channels was done on the basis of residential but not business populations, and that the demand analysis was so skimpy that the methodology or conclusions could not be understood. Additionally, it is alleged that significant traffic arteries are left without coverage.[2]

7. In response, Delray asserts that the profession of the principals in the partnership and the manner of preparation of the application are irrelevant to the evaluation of the application itself when otherwise acceptable. Delray states further that the methodology used for its demand assessment included market-specific demographic factors

and that its allocation of channels on the basis of geographic apportionment of residential population counts is acceptable. This is particularly so since commercial service users are not confined to locations in and around their places of work, Delray contends.

8. Mid-America's charge that the failure of the principals in Delray to meaningfully participate in the development of the application is bereft of any factual assertions. The rules or policies of the Commission are not violated by the mere fact that the principals practice an unrelated profession and reside in an area far removed from the Beaumont MSA. In discussing the public need showings for cellular markets beyond the top-90, we have stated that an applicant must demonstrate that its system is "market-specific and was designed in response to local demand characteristics through the use of demographic data, demographic-based projections and other predictive methodologies." *Public Notice*, "Cellular Application Filing Policies", Report No. CL-75, released June 6, 1984. Mid-America's claim is rejected. Notwithstanding the affidavit submitted by Mid-America's expert (contested by Delray's expert) alleging the survey's insufficiency, Mid-America presents no evidence that Delray did not employ the results of its demand study based on the demographics of the Beaumont MSA. Finally, we reject Mid-America's allegations regarding the inadequacy of Delray's highway coverage because the Commission does not impose a coverage standard for major highways as this would defeat applicant design flexibilty. *See Cellular Lottery Rulemaking, supra* 56 Rad.Reg. 2d (P&F) at 35. *See also recon.* 58 Rad.Reg. 2d (P&F) at 685.

Conclusion

9. We find, therefore, that the financial showing in Delray's application meets Commission standards, and that its engineering and demand studies are sufficient. Delray's application is therefore financially and technically acceptable.

10. Accordingly, IT IS ORDERED That The Petitions to Deny filed by Mid-America Cellular Systems, Inc., Port City Cellular Communications, and The Alliance ARE DENIED.

11. IT IS FURTHER ORDERED That the application of the tentative non-wireline selectee for market number 101, Delray Cellular Associates (File No. 31467-CL-P-101-A-84), IS GRANTED.

12. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

Kevin J. Kelley

Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] We also find that Delray has met the Commission requirements for updating its application pursuant to Section 1.65 and that the omission of its debt service expense is immaterial;its loan would be more than sufficient to cover this cost.

[2] Furthermore, Mid-America claims that Delray's proposed 39 dBu contour extension into the adjoining MSA lacks any engineering justification, and therefore is prohibited. We reject this claim. Delray states in its application that it would employ a directional cardiod antenna and use minimum transmitter power in order to serve an area of the Beaumont MSA with an irregular boundary. The resulting overlap into the adjoining MSA is therefore unavoidable, says Delray. These statements meet our requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OVERSEAS TELECOMMUNICATIONS, INC.

File No. CSG-86-061-P/L

Application for authority to construct
and operate a 6/4 GHz international
earth station at Quantico, Virginia
for provision of INTELSAT
Business Services

ORDER AND AUTHORIZATION

Adopted: October 6, 1986 **Released: October 10, 1986**

By the Common Carrier Bureau:

1. The Commission is considering an application filed on June 5, 1986, by Overseas Telecommunications, Inc. (OTI), requesting authority, pursuant to Title III of the Communications Act of 1934, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, to construct and operate international satellite facilities at Quantico, Virginia, for provision of INTELSAT Business Services (IBS) and international television service. The application was placed on public notice on July 9, 1986. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the US and various overseas points for provision of IBS.[1]

2. The proposed earth station will consist of a 15 meter antenna connecting with an INTELSAT V satellite in the 6/4 GHz band. The proposed earth station will be located on the U.S. Marine Base at Quantico, Virginia, and will be used to provide a full range of IBS services to an agency of the federal government.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. OTI's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. OTI has been authorized to construct and operate other IBS earth stations for international services. The proposed earth station complies with INTELSAT performance criteria for IBS stations. OTI has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of the proposed services and facilities is in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309, and 319 of the Communications Act of 1934 and Section 201(c) of the Communications Satellite Act of 1962, that application File No. CSG-86-061-P/L IS GRANTED and OTI is authorized to construct and operate the proposed earth station at Quantico, Virginia to provide IBS and related digital video services and international television service. [5] Before completion of equipment installation and facility activation, however the applicant should provide the Commission with a summary of actually installed equipment.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See *AT&T et al.*, (File No. I-T-C-86-035 *et al.*), Mimeo No. 3220 (released March 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-1145

In the Matter of

Investigation of Access and Divestiture Related Tariffs — Phase I

ORDER

Adopted: October 7, 1986; Released: October 10, 1986

By the Chief, Common Carrier Bureau:

1. The companies in GTE Midwestern Telephone Operations (MTO) and the General Telephone Company of the South (GTS) request a waiver of the Commission's balloting and allocation requirements to allow the late mailing of second ballots by MTO and GTS for end offices converted to equal access in July, August and September 1986.[1] Petitioners state that file transmission errors have been discovered which require a delay in the mailing of second ballots. *Id.* at 1.

2. Under the procedures set forth in the Commission's *Allocation Order*, local exchange carriers (LECs) are required to send second ballots to customers who have failed to respond to the initial ballot no later than 90 days after an end office is converted to equal access. [2] The applicable GTE Operating Companies (GTOC) tariff provides that the second ballot will be sent 30 days after conversion of the end office.[3] MTO and GTS report that they have recently discovered, in response to interexchange carrier (IXC) inquiries as to the status of end user presubscription choices, that several files containing IXCs' orders on behalf of their end users have inadvertently been lost. As a result, some customers were not assigned to their chosen IXCs upon end office conversion.

3. MTO and GTS recognized that the lost files contained customer orders which could affect the allocation percentages used to assign customers to the IXCs. Both companies therefore decided to halt the allocation process until the error could be corrected. MTO and GTS report that they are in the process of recreating the lost files and processing the end user choices. MTO petition at 3; GTS petition at 3. MTO proposes to prepare the allocation extract on or about October 18, 1986, and to mail its second ballots on or about November 17, 1986. Based upon this schedule, the second ballots would be mailed approximately 109 days after the July 31 conversion, 79 days after the August 30 conversion and 51 days after the September 27 conversion. GTS proposes to mail the second ballot for Ashland, Kentucky approximately 51 days after the August 23 conversion date and 86 days after the August 23 conversion of all remaining GTS offices. *Id.* According to petitioners, all IXCs have been or are being notified of the error and the proposed resolution. *Id.* The companies also state that they have instituted additional safeguards to prevent a recurrence of the error.

4. We have concluded that the resolution proposed by MTO and GTS represents a reasonable effort to mitigate the loss of the presubscription records. The plan affords customers the opportunity to reaffirm their initial selection of an IXC in the event MTO or GTS is unable to recreate any portion of the lost files. Moreover, the delay in preparation of the allocation extract is necessary to help ensure that each IXC receives its fair allocation of non-presubscribed customers.

5. Accordingly, IT IS ORDERED that the request of GTE Midwestern Telephone Operations for waiver of the Commission's Rules to permit late mailing of second ballots IS GRANTED.

6. IT IS FURTHER ORDERED that the request of General Telephone Company of the South for waiver of the Commission's Rules to permit late mailing of second ballots IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Petition for Waiver, filed Sept. 23, 1986 by GTE Midwestern Telephone Operations (MTO petition); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Petition for Waiver, filed Oct. 3, 1986 by General Telephone Company of the South (GTS petition).

[2] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985) (*Allocation Order*). Pursuant to that Order, LECs must send their customers ballots for use in selecting an interexchange carrier prior to the conversion of each end office to equal access.

[3] Petition at 2. *See* GTOC Tariff F.C.C. No. 1, Section 6.5(A).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-181

In the Matter of
Midyear 1986 Access
Tariff Filings

ORDER

Adopted: October 7, 1986 ; Released: October 10, 1986

By the Chief, Common Carrier Bureau:

1. In its *May 20 Order*[1] the Bureau rejected certain provisions in the midyear 1986 access tariff revisions filed by the National Exchange Carrier Association (NECA), the Bell Operating Companies, and other local exchange carriers (LECs) and directed them to file tariff revisions providing for unrestricted WATS Access Lines (WALs), to be effective June 1, 1986. In the *May 30 Order*[2] the Bureau granted all carriers a waiver of the standard ordering interval to allow time for the resolution of various problems which impeded the timely implementation of the changes required by the *May 20 Order*. The Bell Atlantic Telephone Companies (Bell Atlantic)[3] seek further extension of the waiver of the standard ordering interval in connection with the provision of unrestricted WALs in the state of Pennsylvania.[4]

2. Bell Atlantic asserts that provision of dual jurisdiction WALs in Pennsylvania has proven more difficult because there are three classes of intrastate WATS service in Pennsylvania. *Id.* at 2. While in some states the LEC need make only one translation change in a switch in order to provide dual jurisdiction WALs, Bell Atlantic states that Bell of Pennsylvania must make at least six translation changes per switch – three for one-way service, and three for two-way service. Bell Atlantic reports that translations have been implemented in 79 of the 241 Pennsylvania end offices equipped with WATS capabilities, and that it anticipates completion of the translation changes by December 31, 1986. *Id.* at 3.

3. Petitioner also reports that it has received orders for dual jurisdiction WALs in several offices which have not yet been converted and which cannot be filled within the standard interval. *Id.* The company requests that, until the translation changes are completed, the standard interval be increased by 13 days for "non-design" WALs, and by five days for "designed" WALs. [5] Bell Atlantic states that standard intervals would continue to apply for WATS access lines ordered from offices where the necessary translations have been made. *Id.*

4. Bell Atlantic's request for an extension of the waiver granted in the *May 30 Order* is limited and reasonable.[6] The Bell Atlantic petition has convinced us that the unusual circumstances faced by Bell of Pennsylvania in its efforts to achieve compliance with the *May 20Order* warrant granting the waiver sought through December 31, 1986. The petition is therefore granted.

5. Accordingly, IT IS ORDERED that the petition for waiver filed by the Bell Atlantic Telephone Companies requesting a waiver of the standard ordering interval as described herein IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Midyear 1986 Access Tariff Filings, Mimeo No. 4621, released May 20, 1986 (*May 20 Order*).

[2] Midyear 1986 Access Tariff Filings, CC Docket No. 86-181, Mimeo No. 4987, released May 30, 1986 (*May 30 Order*), at para. 22.

[3] The Bell Atlantic Telephone Companies are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

[4] Midyear 1986 Access Tariff Filings, CC Docket No. 86-181, Petition for Waiver filed Sept. 24, 1986 by the Bell Atlantic Telephone Companies (petition).

[5] Bell Atlantic has informed the staff that "designed" WALs are used when the WATS office serving the customer's premises lacks either the capacity or the capability to provide service and must be trunked to a different office by means of a WATS Access Line Extension (WALE); "non-designed" WALs are those provided directly from the WATS office serving the customer's premises.

[6] We must note, hoever, that Bell Atlantic neglected to request this waiver extension until after the expiration date (August 31) of the waiver established in the *May 30 Order*. Our action here in granting the requested waiver should not be construed as condoning such a practice, particularly in light of the fact that Bell Atlantic's knowledge of the translation complexities confronting Bell of Pennsylvania should have prompted Bell Atlantic to seek a waiver in a more timely fashion.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

KELN - Valley Communications, Inc.

File No. 24627-CD-P/L-1-84

For Authority to Provide One-Way Paging on the FM Subchannel of Station KELN in the Public Land Mobile Service at North Platte, Nebraska

MEMORANDUM OPINION AND ORDER

Adopted October 3, 1986; Released October 10, 1986

By the Common Carrier Bureau:

1. On Setpember 28, 1984, Con-Tac Communications, Inc, (CTC) filed a Petition to Dismiss or Deny the captioned application submitted on behalf of KELN - Valley Communications,Inc., licensee of FM Station KELN (KELN) by First CityCom Corporation (First CityCom),lessee of KELN, for common carrier one-way paging service on KELN's FM subchannel (FM SCA). Responsive pleadings were filed. CTC alleges that KELN is unqualified to be a Commission licensee because North Platte FM Paging Service (NPPS), the agent of First CityCom, has been providing private carrier paging service on the FM SCA of KELN in violation of Sections 90.405 (b) and 90.494 (a) of the Commssions Rule's concerning transmission of subscriber personal messages. The Petition noted that CTC had initially filed a Petition for Cease and Desist Order against NPPS before the Commission's Private Radio Bureau on the same ground. The Petition to Dismiss or Deny also alleges that the subject application is defective because its response to Item 3 of the application fails to state whether First CityCom presently operates or leases any other common carrier facility within 40 miles and omits that First CityCom had informed the Commission's Private Radio Bureau that it was about to offer private common carrier paging service.

2. After reviewing the pleadings, we conclude that the allegation in CTC's Petition to Dismiss or Deny concerning First CityCom's violations of Part 90 of the Rules is without merit. The Private Radio Bureau has determined that the pleadings have failed to allege any basis for issuing a cease and desist order. *See* Letter of September 11, 1986 from Chief, Private Radio Bureau to James S. Finerfrock, Esq.

3. Moreover, the statement in the application that First CityCom has no other common carrier paging facilities existing or proposed within 40 aeronautical miles of the KELN transmitter is sufficient. Thus, we conclude that KELN is legally, technically, and otherwise qualified to operate the proposed service.

4. Accordingly, the Petition to Dismiss or Deny the subject application of KELN filed by Con-Tac Communications IS DISMISSED and the application of KELN, File No. 24627-CD-P/L-1-84, IS GRANTED.

5. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

Kevin J. Kelly
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

COMMUNICATION SPECIALISTS CO., INC.

File No. 24640-CD-P/L-03-85

For a Construction Permit to establish a facility to operate on frequency 152.12 MHz in the Public Land Mobile Service at Cape Lookout, near Tillamook, Oregon

ORDER ON RECONSIDERATION

Adopted September 30, 1986; Released October 10, 1986

By the Chief, Common Carrier Bureau:

1. On March 31, 1986, the Mobile Services Division (Division) returned as defective the above-referenced application filed by Communication Specialists Company, Inc. (CSC).[1] CSC filed a Petition for Reconsideration and Acceptance of Application on May 23, 1986. We have considered CSC's arguments and have concluded that they are without merit.

2. The Division returned CSC's application after it concluded that the application requested an additional channel for KOP322 but did not contain the traffic loading study required to justify such an additional channel. CSC contends that its proposed facility is intended to be part of a "ribbon" system which will provide continuous coverage along Highway 101 and therefore its application is not a request for a second channel to its existing facility and no traffic loading study is required. Alternatively, CSC argues that it can justify a second channel and attaches a traffic loading study as support for the second frequency.

3. The CSC application, as originally filed, did not contain a study showing the current or projected traffic loading in accordance with Section 22.516 of the Commission's rules. This was a fatal defect and can not now be repaired by an amendment submitted after the application was returned as unacceptable for filing. We also find that CSC's contention that its application does not constitute an additional facility so that no traffic loading study was required to be without merit. As noted in *David R.Williams d/b/a Industrial Communications*, Mimeo No. 6153, released August 6, 1986, we do not distinguish between wide-area and local-area service for purposes of reviewing additional frequency requests. Thus, the CSC application did not contain the required traffic loading study and was properly returned as defective.

4. Accordingly, IT IS ORDERED, That the Order on Reconsideration filed by Communication Specialists Company, Inc. IS DENIED.

5. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] See Public Notice Report No. PMS-86-30-A, released April 23, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re: Application of

Susquehanna Broadcasting Co., licensee of WQBA(AM), Miami, Florida, for Compensation of expenses incurred in mitigating Cuban Interference

OPINION AND ORDER

Adopted: September 29, 1986 Released: October 3, 1986

By the Chief, Mass Media Bureau

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has under consideration the above-captioned application, filed on October 1, 1984, by Susquehanna Broadcasting Company (Susquehanna), licensee of Station WQBA(AM), Miami, Florida, for compensation, pursuant to Section 7 of the radio Broadcasting to Cuba Act and Part 1, Subpart M of the Commission's Rules, of costs incurred in mitigating Cuban interference.

2. On February 20, 1981, Susquehanna filed a construction permit application to increase WQBA's operating power, relocate its transmitter site and modify its day and night directional antenna parameters in order to mitigate the effects of Cuban interference. WQBA operates on a frequency of 1140 kHz and, at the time its construction permit application was filed, was licensed at a power of 10 kw day and 5 kw night using a common directional antenna. This construction permit was granted on August 13, 1981.

3. Because WQBA's construction permit was granted prior to April, 1984, WQBA falls within the exception provided by § 1.1706(b) of the Rules exempting it from the requirements of § 1.1704 and § 1.1705 relating to showings of minimum level and duration of Cuban interference.

4. Notwithstanding this exemption, however, § 1.1708(b)(4) of the Rules precludes compensation for costs incurred for the purpose of extending the interference-free service area of a station beyond that which would otherwise be provided in the absence of Cuban interference. In this regard, we have conducted an engineering study which indicates that it is unlikely that any new areas are served as a result of WQBA's daytime modifications. The modified nighttime operation, however, results in interference-free coverage being provided to some inland area to the north and to the southwest not previously served by WQBA's former facilities. This is principally a result of WQBA's transmitter site relocation which was necessary in order to accommodate the new antenna array required to provide the requisite domestic interference protection. In any event, it is clear that the modifications to both the daytime and nighttime transmitting facilities were made for the purpose of mitigating the effects of interference from Cuba and not for the purpose of rendering service to previously unserved areas. Accordingly, we find that § 1.1708(b)(4) does not pose a bar to full payment of whatever compensation Station WQBA is otherwise entitled.

5. All construction associated with the construction permit is complete and the applicant has confirmed that all related expenditures have been declared in its application. Therefore, a provisional finding is unnecessary. Accordingly, this *Opinion and Order* constitutes a definitive finding under § 1.1711 of the Rules.

6. Each expense item submitted with the application has been carefully examined for conformance with the compensation standards of § 1.1708 of the Rules. The application has been amended as necessary to correct deficiencies and supply additional clarifying information. An item-by-item listing of the expenses claimed, including FCC reference numbers, amounts, purposes and other relevant information has been prepared based on the amended application and will be forwarded to the United States Information Agency with this *Opinion and Order*. A copy of that list will be available for public inspection in the Public Reference Room, located in Room 239 of the Commission's main building, 1919 M Street, N.W., Washington, D.C.

7. The application contains a showing of the amount of depreciation taken on replaced equipment as required by § 1.1709(d)(2) of the Rules. This amount has been subtracted from the compensable expenses as required by § 1.1708(a)(1) of the Rules and Section 7 of the Radio Broadcasting to Cuba Act.

8. § 1.1710 of the Rules establishes priorities among applicants in order to provide an equitable basis for the distribution of available funds. WQBA's application falls within the third priority group. Within this third priority group, it shares first priority with several others with the same filing date.

9. Accordingly, pursuant to 47 C.F.R. § 0.61 and § 1.1712, IT IS ORDERED, That the Federal Communications Commission, upon examination of the above-captioned application of Susquehanna Broadcasting Company, Finds that the applicant has met the requirements of Section 7 of the Radio Broadcasting to Cuba Act and Part 1, Subpart M of the Commission's Rules for compensation in the amount of $ 714,833.63. Procedures for review of this finding are set forth in § 1.1712(b) of the Rules. This Finding does not constitute entitlement to compensation, which will depend upon the availability of appropriated funds and compliance with such requirements as may be established by the United States Information Agency which, under the Act, is responsible for making compensation payments.

FEDERAL COMMUNICATIONS COMMISSION

James C. McKinney
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOMMUNICATIONS SYSTEMS, INC.

File No. I-T-C-86-156

Application for authority
to provide resale service
between the U.S. and various
overseas points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 24, 1986 Released: October 8, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on August 5, 1986, and supplemented by letter of September 11, 1986 by Telecommunications Systems, Inc. (TSI), requesting authority to use existing message telephone facilities to provide international switched voice services between the U.S. and various overseas points. TSI proposes to use existing facilities of other international carriers to provide the proposed services. The application was placed on public notice on August 13, 1986. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. TSI, a South Carolina Corporation, is already providing domestic resale services. It now proposes to compete with other carriers which already provide international switched voice services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. One of the overseas points TSI proposes to serve is Cuba. Since 1962, the United States has exercised an embargo upon trade and commercial relations between the United States and Cuba as authorized by the Cuban Embargo Act of 1961, 22 USC 2370. It has been the policy of the U.S. government to deny requests to upgrade telecommunications facilities between the U.S. and Cuba. The Commission has acted on applications for service to Cuba in accordance with this policy.[3] Applications for service to Cuba, are returned as unacceptable for filing, absent an accompanying statement from the State Department that such a filing is in accord with U.S. policy. The required State Department statement was not submitted with the captioned application. In the present instance, Cuba is one of many overseas points TSI is presently proposing to serve. We will therefore dismiss TSI's request to serve Cuba without prejudice to filing in the future.

4. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TSI.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-86-156 IS GRANTED, and TSI is authorized to provide international switched voice services between the U.S. and Virgin Islands, Antigua, Barbados, Bahamas, Bermuda, Cayman Islands, Dominica, Dominican Republic, French Antilles, Grenada, Haiti, Jamaica, Netherlands Antilles, St. Lucia, Turks & Caicos, Trinidad, St. Vincent, Belize, Costa Rica, El Salvador, Honduras, Guatemala, Nicaragua, Panama, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

6. IT IS FURTHER ORDERED that TSI's request to serve Cuba IS DISMISSED without prejudice to filing in the future.

7. Copies of any operating agreements entered into between TSI and its correspondents will be filed with the Commission within 30 days of their execution.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

[1] See the cases cited in Teltec Saving Communications Co., Mimeo No. 3548 (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

[3] Order Dismissing Application, Mimeo No. 6460 (released October 12, 1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-81

In the Matter of

AT&T Communications Transmittal Nos. 604 and 628
Tariff F.C.C. Nos. 1 and 2

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1986; Released: October 6, 1986

By the Commission:

1. The Maine Public Advocate (Maine) and the Vermont Public Service Board and the Vermont Department of Public Service (Vermont) have filed Applications for a Stay of that portion of the Common Carrier Bureau's Memorandum Opinion and Order in the captioned proceeding[1] which denied petitions to reject and petitions to suspend and investigate tariff revisions filed by AT&T Communications (AT&T).[2] Those tariff revisions flow through state gross receipts taxes directly to AT&T consumers and became effective June 1, 1986. As discussed below, we are dismissing the applications for stay.

2. Under the tariff revisions at issue, AT&T imposes a separate charge on customers in jurisdictions which tax AT&T's interstate gross receipts. The charge is based on a fixed percentage of revenues for interstate services provided and billed to each customer service location within that jurisdiction and is shown as a separate line item on the customer's bill. This charge varies among such jurisdictions and is designed to shift the recovery of AT&T's gross receipts tax liability from all of AT&T's customers to only those customers in the jurisdictions imposing and benefiting from these taxes.

3. Maine's pleading "requests that the Chief of the Common Carrier Bureau stay that portion of its Order.which imposes a surcharge on states which impose gross receipts taxes," pursuant to Section 1.102(b)(2) of the Commission's Rules.[3] In support of its request, Maine claims that (1) its Application for Review makes a substantial argument on which we could base a decision to vacate the Bureau's Order; (2) the gross receipts tax surcharge will cause irreparable harm to Maine residents whenever a refund allegedly will be impossible, *i. e.*, to coin telephone customers or to customers who move after incurring toll charges which include the surcharge; (3) a stay of the surcharge will have a substantial effect on the public interest since residents of other states are also subject to the "unlawful" surcharge; and (4) the balance of equities favors granting a stay. According to Maine, the detriment of a stay to AT&T will not be as great as the benefit to its toll customers because the pre-June 1 status quo has already been found to be reasonable, and thus, AT&T will not be prejudiced by a stay. Alternatively, Maine continues, if the surcharge is not stayed and is later found unlawful, there will be a detriment both to AT&T and to its customers. Vermont's pleading makes the same general arguments, but the request for relief is based upon Section 1.115(h)(2) of our Rules.[4]

4. AT&T argues in response that granting a stay in this case would require suspension of an effective tariff, which this Commission cannot order until an investigation into the tariff's lawfulness has been completed. In support of its argument, AT&T cites two court opinions interpreting Section 204(a) of the Communications Act[5] : *MCI Telecommunications Corp. v. FCC*. 561 F.2d 365, 374 n.44 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (*MCI v. FCC*); *American Telephone and Telegraph Co. v. FCC*, 487 F.2d 865, 874-75 (2d Cir. 1973) (*AT & T v. FCC*).[6]

5. Vermont contests AT&T's reliance on the suspension provisions of 47 U.S.C. § 204(a) in this matter and claims that Section 5(c)(6) of the Act[7] is the source of our authority to grant a stay here. Vermont claims that the distinction between stays and suspensions is important because Section 204(a) of the Act concerns suspensions of new or revised charges prior to their effective date but that Section 1.115(h)(2) of our Rules allows us to stay the effect of a rate change already in effect while Commission review is undertaken. Vermont claims that treating a stay as a suspension, as AT&T argues, would allow the Bureau Chief to exercise unreviewed authority in violation of Section 5(c)(6) of the Act "and the constitutional principles of delegated legislative power." In its Opposition, AT&T asserts that Section 1.115(h)(2) of the Rules does not allow us to stay an already effective tariff and that a decision declining to suspend a tariff is not a final adjudication on the lawfulness of that tariff and does not give the Bureau Chief unreviewable authority.

6. Moreover, AT&T argues, it is doubtful that Maine or Vermont have made the requisite showing for a stay.[8] AT&T asserts that Maine and Vermont are unlikely to prevail on the merits since the stay requests and Applications for Review, fail to present any arguments which would justify disturbing the Bureau's conclusions. In addition, AT&T argues that Maine and Vermont residents would not suffer *irreparable* harm in the absence of a stay because adversely affected customers could recover damages through the complaint process[9] if the flow-through were found unlawful. Furthermore, AT&T claims, if the flow-through were now stayed, AT&T would have to raise its rates to customers in states which do not impose gross receipts taxes to make up for the shortfall, which would harm those other customers. Finally, AT&T alleges that a rate increase coming after the recent, heavily-publicized rate reductions which were instituted in these revisions would be highly disruptive and would generate unwarranted public confusion, and thus, a stay would not serve the public interest.

7. The Bureau's decision would not foreclose any ratepayer who believes the tariff is unlawful from seeking damages in a Section 208 complaint. Therefore, irreparable harm would not result in the absence of a stay. A showing of irreparable harm is essential to support the grant of a stay. Inasmuch as the petitioners have failed to demonstrate that a stay would be justified, we need not determine whether a stay could be granted under these circumstances.

8. Accordingly, IT IS ORDERED that the Applications for a Stay filed by the Maine Public Advocate and the Vermont Public Service Board and the Vermont Department of Public Service ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] AT&T Communications, CC Docket No. 86-81, Mimeo No. 4868, released May 30, 1986. Several parties, including Maine and Vermont, have filed Applications for Review of that decision.

[2] AT&T has filed Oppositions to these applications.

[3] 47 C.F.R. § 1.102(b)(2). This section provides that if a petition for reconsideration of a non-hearing action is filed, the designated authority may stay the effect of its action pending disposition of the petition for reconsideration.

[4] 47 C.F.R. § 1.115(h)(2). This section provides that if the Commission orders further proceedings, it may stay the effect of the Order from which review is sought.

[5] 47 U.S.C. § 204(a) (the Act).

[6] Another procedural issue raised by AT&T is that Maine has asked the Bureau to stay its Order but has filed an Application for Review by the Commission -- not a petition for reconsideration by the Bureau, as Section 1.102(b)(2) requires. The Bureau has, however, referred Maine's request for stay to us under Section 1.102(b)(3) of the Rules, 47 C.F.R. § 1.102(b)(3), since Maine has filed an Application for Review. This rule provides that if an Application for Review is filed, the Commission may stay the effect of an action until its review has been completed.

[7] 47 U.S.C. § 155(c)(6). This section states: "If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405."

[8] The criteria used to determine whether a stay of a Commission Order may be warranted are: (1) whether the petitioner has demonstrated a strong likelihood that it will prevail on the merits; (2) whether the petitioner will suffer irreparable injury in the absence of a stay; (3) whether the issuance of a stay would substantially harm other interested parties; and (4) whether the public interest favors grant of a stay. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), *modified*, Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

[9] 47 U.S.C. § 208.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

SPANISH INTERNATIONAL COMMUNICATIONS CORPORATION	MM Docket Nos. 83-540 to 83-544 and 84-830 to 84-834
For Renewal of license of: KWEX-TV San Antonio, Texas, et al.	File Nos. BRCT-830401LM et al.
BAHIA DE SAN FRANCISCO TELEVISION COMPANY	MM Docket No. 83-545 File No. BRCT-800730KJ
For Renewal of license of: KDTV (TV) San Francisco, California	
THE SEVEN HILLS TEVEVISION COMPANY	MM Docket Nos. 83-657 and 84-835 File Nos. BRCT-830601KJ and BPTT-8403081Q
For Renewal of license of: KTVW-TV Phoenix, Arizona, et al.	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1986 ; Released: October 9, 1986

By the Review Board:

1. By a series of *Orders*, 48 Fed. Reg. 28,549 (1983), 48 Fed. Reg. 33 539 (1983) and 49 Fed. Reg. 35,691 (1984), the Commission designated for consolidated hearing all of the renewal, license, and permit applications of Spanish International Communications Corporation and Bahia De San Francisco Television Company (collectively herein "SICC"), and Seven Hills Television Company ("Seven Hills"), respectively, on, *inter alia*, an issue to determine whether the stations were under alien control in contravention of Section 310 of the Communications Act of 1934, as amended, 47 U.S.C. §310. Following an evidentiary hearing, Administrative Law Judge (ALJ) John H. Conlin issued an *Initial Decision (I.D.)*, FCC 86D-1, released January 8, 1986, which concluded that "the requested renewal applications of these corporations, as they are presently structured, must be denied." *I.D.* at para. 192. He revivified the applicants, however, by suggesting in the *I.D.* that, upon review, the parties may seek "a less drastic remedial solution, such as a corporate restructuring...." *I.D.* at para. 194. Heeding that express invitation, SICC, Bahia, and the Mass Media Bureau, along with Fouce Amusement Enterprises, Inc. (Fouce) and SIN, Inc. ("SIN"), two other entities possessing party status, jointly filed a settlement agreement with the Review Board on June 23, 1986, seeking termination of the proceeding as to SICC (and Bahia) through a grant of their applications, subject to the condition that their authorizations be transferred promptly to qualified unrelated buyers. A motion, including all of the requested relief, was to follow within sixty days of the signing of the agreement. Exceptions to the *I.D.* were filed on August 16 and 17, 1986, respectively. On August 19, 1986, the joint motion was filed requesting Board approval of the settlement agreement, grant of SICC's (and Bahia's) applications (subject to the above noted condition), severance of the Seven Hills' applications because that applicant has not joined in the settlement agreement, termination of the proceeding as to SICC (and Bahia), and dismissal of all pending pleadings concerning the two applicants. Although, as noted, the agreement contemplates that all pleadings would be dismissed as moot relative to SICC (and Bahia), it is urged that the arguments contained therein would continue in force with respect to Seven Hills. Both the Spanish Radio Broadcasters of America, Inc. ("SRBA"), a party herein, and Reynold V. Anselmo, the president and majority stockholder of Seven Hills, filed pleadings in support of the requested relief.[1]

2. The Commission's general policy on applications for the transfer of the licenses of those whose basic qualifications are unresolved was encapsulated recently for the Court of Appeals [2]:

> "In general, a licensee whose qualifications are subject to question cannot transfer its license until the questions are resolved in the licensee's favor *unless other factors indicate that the transfer is in the public interest. See Jefferson Radio Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964); *Radio San Juan, Inc.*, 45 FCC 2d 375 (1974); *Qualifications of Broadcast Applicants*, 28 Rad. Reg. 2d (P & F) 705 (1973). The purpose of this policy is to prevent a licensee from engaging in misconduct and then selling his station in order to escape the consequences of his actions. *Northwestern Indiana Broadcasting Corp.*, 60 FCC 2d 205, 209-10 (1976)."

We, also, have recently touched upon that policy, particularly certain equitable exceptions, in Calhoun County Broadcasting Co., FCC 86R-34, released May 27, 1986. There, in permitting the transfer by a licensee found unqualified after hearing, we relied upon those cases holding that a physical impairment that has affected the licensee's abilities may be grounds to permit a requested transfer, irrespective of that licensee's basic qualifications. *See id.* However, no such "impairment" situation exists here.

3. Another exception to the general policy stated in paragraph 2, above, is the so-called minority "distress sale" policy, which policy exception permits licensees whose basic qualifications are encumbered by substantial and material questions to transfer their licenses to racially favored minority entities, at below market value, if an evidentiary hearing has not commenced. *See Stereo Broadcasters, Inc., aff'd*, 652 F.2d 1026 (D.C. Cir 198). This general policy exception, too, is applied strictly. *See id.*[3] Again, however, the "distress sale" policy exception is inapposite to the settlement request before us, for the chief and obvious reason that the proposed transferee is not purported to be a racially favored minority entity. *See also supra*, note 3. In fact, as we observed in dictum in *West Jersey Broadcasting Co.*, 90 FCC 2d 363 (Rev. Bd. 1982), the allowance of a post-hearing alienation of the license-of a disqualified license holder to a racially non-favored entity would do some certain violence to the "distress sale" policy in that[4]:

"the precedent set by a grant of the relief requested here by West Jersey would wholly eviscerate the carefully balanced incentives embodied in the minority ownership policy statement and undercut fatally the disincentives inherent in the Commission's general policy of refusing to permit disqualified licensees to avert the consequent processes of law. Were a disqualified licensee permitted to avoid the serious ramifications of non-renewal or revocation by simply passing the sullied license, hand-over-hand, throughout its organizational structure until it reposed in the grasp of a putative "Mr. Clean," it is doubtful that the *Minority Ownership* "distress sale" policy would retain much vitality."

Here, however, SICC does not propose - as did the *West Jersey* licensee - an in-house sale to any of its own past or current principals. Instead[5]:

"The Agreement precludes present individual or corporate principals of either SICC or Bahia from becoming officers and directors of the buyer of either company; bars their acquiring an equity interest in the buyers for two years; and places maximum limits on such future interests."

4. Another exception to the general policy, this one co-sired by the judiciary in *LaRose v. FCC*, 494 F.2d 45 (D.C. Cir. 1974), holds that the Commission's license transfer policies must be sensitive to other national policies, and that comity ought be afforded to the proceedings of other federal courts, in that case a bankruptcy court, which proceedings may be impacted by the transfer status of the broadcasting licenses at issue. Rebuffing the Commission's rejection of a proposed license transfer, the *LaRose* court noted that[6]:

"this treatment of the license renewal question does little to accommodate the Commission's mandate to regulate in the public interest. This mandate is as broad as it is difficult to define. *See generally Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed. 2d 701 (1971); *Radio Relay Corp. v. FCC*, 409 F.2d 322 (2 Cir. 1969)."

Cf. Community Tel. of Southern Cal. v. Gottfried, 103 S. Ct. 885 892 n. 14 (1983) ("an agency charged with promoting the "public interest' in a particular substantive area may not simply "ignore"' other federal authorities). In that regard, we officially notice that United States District Court Judge Mariana R. Pfaelzer has approved of the settlement of a lengthy and complex stockholders' derivative suit involving SICC, which settlement is, in turn, contingent upon approval of the settlement and license transfer request now before this Board. *See Order Re Approval of Settlement*, dated May 12, 1986, in *Fouce Amusement Enterprises, Inc. and Metropolitan Theaters Corp. v. SICC, et al.*, Case No. CV 76 3451 MRP (C.D. Cal.).[7] To the extent that Judge Pfaelzer's imprimatur reflects any substantive approval of the settlement arrangements set forth in the *Fouce Amusement* agreement, we would be loathe to upset the applecart. Even if that is not so, settlement assists the crowded dockets of the federal courts. Additionally, we are advised that approval of the settlement agreement before us will facilitate a settlement of another federal case "now consolidated as *In re Spanish International Communications Corporation Antitrust Litigation*, MDL No. 596 (Antitrust Litigation)."[8] SRBA urges that settlement of that federal court action will be effectively resolved by approval of the settlement agreement here. It goes almost without saying that federal policy very strongly encourages amicable settlement of civil litigation. *Cf. Las Misiones De Bejar Television Co. v. FCC*, 772 F.2d 979 (D.C. Cir. 1985).

5. And lately, in *George E. Cameron Jr. Communications*, 56 RR 2d 825 (1985), the Commission waived its general policy to permit a licensee found utterly unqualified by ALJ Conlin and this Review Board to settle its litigation with competing applicants and to transfer its licensees because of "an unusual and complex set of circumstances." *Id.*, at 828. Much as in the case at bar, the *Cameron* licensee had been found disqualified, *inter alia*, because it appeared that a *de jure* minority shareholder, through his greater financial leverage and active measures, so dominated the *de jure* majority owners of the licensee corporation as to have acquired *de facto* control of the corporation, all in violation of 47 U.S.C. §311(d). In part, because the *Cameron* licensee "did not attempt to conceal [its] activities" by which the minority shareholder usurped *de facto* control, and because the settlement would "terminate these protracted and burdensome proceedings and permit the stations to continue normal operation unencumbered by the prospect of further costly and time consuming litigation," the Commission permitted the settlement and the license transfers. 56 RR 2d at 828.

6. The proceeding before us is, if anything, considerably more ,unusual and complex" than *Cameron*. Without prejudging, in any decisional respect, the merits of the underlying case or the findings and conclusions of the *I.D.*, we must observe that the ownership structure of SICC, the general relationship of its (former) president, Reynold Anselmo, to the Azcarraga family (coupled to the latter's financial support of the licensee), as well as SIN's role as the U.S. distributor of Televisa (or predecessor) programming through SICC (or predecessor) stations, have all been public and notorious throughout nearly a 25-year licenseeship. The nimbus of the wealth, strategic prominence, and entertainment programming interests of the Azcarraga family, mated to its overt control of the Televisa programming distributed by its subsidiary, SIN, to SICC stations, has always held pregnant the clear potential for the Azcarragas to unduly influence the direction of SICC. Yet, as in *Cameron*, SICC "did not attempt to conceal its activities." But, rather, these well-known and interlocking ownership arrangements evoked from the Commission nary a whiffet of official disapprobation; indeed, the Commission routinely renewed SICC licenses for nearly 20 years, during which time the principals of SICC pioneered and perfected Spanish-language programming in the United States. Over those two decades, the FCC affirmatively found - again and again - that SICC's broadcast stewardship was, as a matter of fact and law, in the public interest. Whether or not the Azcarragas' sway over SICC affairs ever rose to the level of excessive influence or *de facto* control over the licensee during that period is, of course, the 64 million-dollar question – a question conventionally suffused with illusiveness and subjectivity. For as stated by the court in *Storer Communications, Inc., v. FCC*, 763 F.2d 436, 442 (D.C. Cir 1985):

> "Determining issues of control, however, is a complex task which must be done on a case-by-case basis. There may be varying degrees of working control exercised at different levels of the corporation."

Earlier, the *Storer* court termed an "oversimplification" the unsophisticated notion[9]:

> "that there are two types of control: *de jure* control resulting from ownership or *de facto* control resulting from actual working control."

It is, precisely, for these several reasons that Judge Conlin decided that an *ex continenti* application of 47 U.S.C. §310(b) as against SICC "might seem to lend a draconian element to the outright refusal to renew the [license renewal] applications in this case,"[10] and he recognized that his *I.D.* "is of course only the first step in the decisional process," suggesting instead a "less drastic remedial solution... such as corporate restructuring."[11]

7. It must be concluded that the *Cameron* precedent is here applicable perforce. There, the Commission "assum[ed] arguendo" that the monied minority shareholder had, in fact, illegally assumed *de facto* control over the licensee corporation, *notwithstanding prior, express warnings to that very licensee against such usurpatious machinations. See id.*, 56 RR 2d at 828. Here, we have no comparable warnings; and the question of whether the Azcarraga family's influence over SICC stations ever ascended to *de facto* control remains *sub judice*, with no "assumption" of illegality. Moreover, despite the "assumed" statutory violation in *Cameron*, the Commission there found that the culpable minority shareholder's actions, while technically violative of the statute, "could be considered to have served the public interest." *Id.* There can here be no serious refutal of the proposition that SICC's and SIN's prodigious, two-decade effort to implant a functional Spanish-language network of stations in this country has served the public interest - *and* the Commission's interest in promoting special programming for minority groups, *see, e.g., En Banc Programming Inquiry*, 44 FCC 2303, 2314 (1960) - in a manner and magnitude far beyond that of the hapless, lawless licensee of KROQ-AM/FM, Burbank, California. Additionally, whereas the Commission accepted the fact that the *Cameron* minority stockholder had personally and willfully violated the law by illegally acquiring *de facto* control over the licensee corporation, Judge Conlin's finding of a somewhat similar violation in this proceeding was clearly predicated on his more generalized perception of corporate structural infirmities, not on individual culpability. The ALJ resolved only that[12]:

> "it must be concluded that alien influence and direction of the Licensee corporations greatly exceeds that permitted by Section 30(b). This influence exists at various levels. It is reflected in the composition of the ownership and board of directors of the licensee corporations, in the stations' management, in its programming and in the historic financial and personal ties between the Licensees and the Azcarraga family and its corporate interests."

Moreover, while the specific individual who had snubbed the Communications Act's licensee control proscriptions was actually permitted in *Cameron* to purchase and to operate one of the offensive KROQ stations, the foreign nationals surmised by Judge Conlin to have usurped *de facto* control of SICC's stations here propose, as part of the instant settlement, to wholly divest their interests in those stations, and SIN with them no more. In addition to *Cameron*, and to the degree that settlement of *Fouce Amusement Enterprises, Inc., supra* para. 4, is directly contingent upon approval of the settlement before us, we believe that the larger spirit of *LaRose v. FCC, supra*, enjoins us to consider the public interest in terminating the complex and litigious stockholders' derivative proceeding now quiescent before U.S. District Court Judge Pfaelzer, as well as the fact that a settlement approval here will likely quell the equally complex federal antitrust case involving our settling parties *(see supra* para. 4).

8. Finally, the settlement agreement here is avidly supported not only by the adversarial parties, and by the Commission's Mass Media Bureau which has investigated and prosecuted this case, the instant settlement agreement's result exceeds even the mere "corporate restructuring" solution explicitly suggested in Judge Conlin's *I.D.* And, we do not disagree with the Mass Media Bureau or the ALJ that the time had surely come to sever all of the interlocking SICC and SIN arrangements, lest 47 U.S.C. §310(b) be denuded of much practical meaning. *See, e.g., Telemundo, Inc. v. FCC*, No. 85-494 (D.C. Cir. decided September 23, 1986), slip op at 4-6. 8-9 (alien ownership and agreements re program source control inconsistent with 47 U.S.C. §310(b) and "statutory policy"). But, all of the circumstances and the more recent precedents considered, the Board finds no compelling administrative values of ample gravity to offset, or begin to offset, the public interest benefits inherent in the proffered settlement. When we regard the historical equities that run to this unique licensee, which has drudged for a quarter-century to provide the United States with a reliable program service - welcomed enthusiastically - in the major Spanish-speaking communities throughout this nation, while others - including this government - stood majestically aback, we are obliged to find that a grant of the settlement agreement before us is, manifestly, in the greater public interest.[13]

9. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Severance, Approval of Settlement Agreement, Conditional Grant of Applications, and Related Relief, filed August 19, 1986, by Spanish International Communications Corporation, Bahia De San Francisco Television Company, Fouce Amusement Enterprises, Inc., SIN, Inc., and the Mass Media Bureau of the Federal Communications Commission IS GRANTED; that the settlement agreement IS APPROVED; that the applications of Spanish International Communications Corporation and Bahia De San Francisco Television Company ARE GRANTED, subject to the conditions contained in the settlement agreement; and that the applications of the Seven Hills Television Company SHALL REMAIN in hearing status; and

10. IT IS FURTHER ORDERED, That the Petition for leave to file information statement, filed May 28, 1986, by SIN, Inc. IS GRANTED; that the motion to reopen the record, filed May 30, 1986, by Spanish International Communications Corporation to reflect recent managerial and ownership changes, which will be treated as a petition for leave to amend pursuant to Section 1.65 of the Commission's Rules, IS GRANTED, and the information proffered IS ACCEPTED; that the Motion to Strike July 1, 1986 Anselmo Letter, filed July 11, 1986, by Spanish

Radio Broadcasters of America, Inc. IS GRANTED, and the letter IS STRUCK; that the motion to strike unauthorized reply pleading, filed July 30, 1986 by Reynold V. Anselmo, IS GRANTED and the pleading IS STRUCK,. that the Motion for Clarification of Procedures. or for Leave to File a Reply, filed July 31, 1986, by Spanish International Communications Corporation IS DISMISSED, as moot; and that the Motion for Leave to File Reply to Comments, filed September 8, 1986, by Spanish International Communications Corporation, Bahia De San Francisco Television Company, and Fouce Amusement Enterprises, Inc. IS GRANTED; and

11. IT IS FURTHER ORDERED, That pursuant to Section 1.294(c)(4) of the Commission's Rules, 47 CFR §1.294(c)(4), the Petition to Intervene and Objections to Proposed Settlement, filed September 26, 1986, by the Mexican American Bar Association of Los Angeles et. al IS DISMISSED.[14]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Anselmo's comments in support of the settlement and transfer of the SICC and the Bahia licenses urge, at the same time, that the severance of the renewal applications of Seven Hills Television Company "be accomplished consistent with precedent and without prejudice to the Commenters obtaining a fair review of the [SICC] *I.D.* " Comments at 2-3. In order to avoid any such apprehended prejudice, it is pleaded that the Board reverse the *I.D.* on the merits on the theory that SICC is an "organic" whole. Thus, "[c]ommenters would oppose severance, however, to the extent that the sale of the stations is premised on a finding that SICC and Bahia have expunged disqualifying alien influence, rather than on a finding that SICC and Bahia are qualified as organic entities." Comments at 3.

Anselmo, who has not joined the proposed settlement so far as it relates to Seven Hills, appears confused as to the principal purpose and value of settlements, to wit: to obviate the need to litigate further the disputed merits of a particular case as to the settling parties. Indeed, not only does Seven Hills, of which Anselmo is the majority owner, continue to except to the *I.D.* , Anselmo himself has asked to intervene as a discrete party-in-interestin that residual case.

No action taken here is intended as a ruling on the outstanding exceptions to the *I.D.* Indeed, inasmuch as any potential violation of the alien ownership and control limitations of 47 U.S.C. §31O(b) would run, in any event, more directly to the Azcarraga interests, with any findings relating specifically to Anselmo being wholly derivative and entirely inferential *(see I.D.* paras. 76, 92), we fail to see how severance would prejudice the interests of Anselmo or Seven Hills Television Company. In that connection, we are keenly aware of the mandate of *Melody Music, Inc. v. FCC,* 345 F.2d 730 (D.C. Cir. 1965), that the agency not treat similarly situated applicants in an injuriously differential manner. Neither the Board nor the Commission will engage in wanton scapegoating.

Finally, we strike those Anselmo pleadings relevant to his discussions with SRBA as to potential settlements with him and/or Seven Hills. These are irrelevant to the instant settlement agreement request, and otherwise inadmissible. *See, e.g., Central Texas Broadcasting, Co., Ltd.* 52 RR 2d 383, 1385 (Rev. Bd. 1982) (Fed. R. Evid. 408 generally makes inadmissible settlement background); *Horne Industries, Inc.,* 52 RR 2d 1009, 1011 (Rev. Bd. 1982). *Accord RKO General, Inc. (KHJ),* FCC 86-383, released September 12, 1986, at n. 11 (Comm'n). Although Anselmo complains that SRBA has engaged in tactics similar to those found to be an abuse of process in *Gulf Coast Communications, Inc.,* 81 FCC 2d 499 (Rev. Bd. 1980) (subsequent affirmances omitted), his pleadings do not allege a similar threat to disclose unknown substantive offenses unless a favorable settlement is reached; merely a threat of continued litigation. Such a "threat" is always inherent in a settlement failure; no abuse of process is perceived on that score. And, insofar as Anselmo's settlement discussions with SRBA go not to this proceeding, but to a contemporaneous antitrust suit in the Fifth Circuit, any claims of abuse should be directed to the appropriate judicial forum.

[2] FCC Brief at 3 n. 5, *Anthony R. Martin-Trigona v. FCC,* No. 84-1229 (D.C. Cir. 1984) (emphasis added). Thus, the "other public interest factors" exception has always been built into the "general policy."

[3] Although the Commission has recently inquired into the possibility of relaxing its minority "distress sale" policy to permit transfers of endangered licenses after the commencement of evidentiary hearings, but prior to the filing of findings of fact and conclusions of law, *see Notice of Inquiry: Distress Sale Policy for Broadcast Licensees,* 50 Fed. Reg. 42047 (1986), that extension would be inapplicable here for three obvious reasons: (1) the prospective transferee is not proposed here to be a racially favored minority purchaser; (2) the *I.D.* disqualifying the licensee has been issued; and, (3) the subject policy extension has not yet been adopted.

[4] 90 FCC 2d at 372.

[5] Joint Petition at 4.

[6] 494 F.2d at 1146-1147 n. 2.

[7] The settlement agreement documents approved by Judge Pfaelzer's May 12, 1986 *Order* are "filed under seal and shall not be made a part of the public file in this action." *Id.* Likewise, they shall not be part of the FCC's public record in this proceeding, but shall remain with the Board under the protection of Judge Pfaelzer's seal.

[8] SRBA Petition In Support of Settlement at 2.

[9] 763 F.2d at 441-442.

[10] *I.D.* at para. 193.

[11] Id., at para. 194.

[12] Id., at para. 176.

[13] While there is no doubt that our action here is fully consistent with legal precedent, the Commission's recent action in *RKO, General, Inc. (KHJ), supra* note 1, also reinforces our view that current FCC policy strongly encourages settlements of unusual, complex, multi-partycases, even where basic licensee qualification issues are unresolved. In light of *Cameron* and *RKO General, Inc.,* we believe that any inconsistent treatment here would be, patently, arbitrary and capricious.

[14] At the 11th hour of the date the Board adopted this order, it received a Petition To Intervene And Objections to Proposed Settlement from a group of organizations headed by the Mexican American Bar Association of Los Angeles County. The Board will reject the petition. Petitioners' request to intervene is grossly out of compliance with 47 CFR §1.223, which sets forth the requirements for intervention in adjudicatory cases. *See generally Committee For Community Access v. FCC,* 737 F. 2d 74, 83-84 (D.C. Cir. 1984) (unanticipated result no basis for grossly late intervention request by community groups). Further, Section 1.294 of the Commission's Rules, 47 CFR §1.294 establishes the filing requirements for this sort of pleading, and subsection (c)(4) thereof provides that oppositions to "[j]oint requests for approval of

agreements" be filed - even by parties - "within 10 days after the [agreement request] pleading" is filed. The joint settlement petition on which we here rule was filed on August 19, 1986 *(see supra para. 1)*; thus, the subject petition to intervene and associated objection is grossly out of time, without so much as an allegation of "good cause," let alone a persuasive equitable showing. Even were the petition timely, the relief sought, *i.e.*, extension of the Commission's minority "distress sale" policy and the imposition of a condition that SICC stations be sold to a minority entity, is beyond this Board's authority *(see generally supra* note 3) and in substantial conflict with Section 310(d) of the Communications Act, 47 U.S.C. §310(d), which, in pertinent part, provides that in acting upon requests for transfers of licenses "the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-394

In re Applications of

POLLACK BROADCASTING CO.	File No. BPCT-860403KE
NEVADA 39, INC.	File No. BPCT-860529KG
WYNN COMMUNICATIONS, INC.	File No. BPCT-860530KS
PUAMEHANA, LTD.	File No. BPCT-860530KT
NEVADA BROADCASTING GROUP	File No. BPCT-860530KX
GOLDHILL BROADCASTING, INC.	File No. BPCT-860530KZ

For Construction Permit
Paradise, Nevada

HEARING DESIGNATION ORDER

Adopted: September 30, 1986 Released: October 10, 1986

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for authority to construct a new commercial television station on Channel 39, Paradise, Nevada.[1]

2. Pollack Broadcasting's application does not include page 19 of FCC Form 301. Consequently, we do not have the applicant's response to Section VI (Equal Employment Opportunity Program and Section VII (Certification). Accordingly, Pollack Broadcasting Co. will be required to submit, as an amendment, a completed page 19 of FCC Form 301 (including appropriate exhibits) to the presiding Administrative Law Judge, within 20 days after this Order is released.

3. Charles Roller and David Goff are limited partners in Puamehana, Ltd. Both parties also have ownership interests in LV Cm, Ltd., an applicant for a new FM radio station in Las Vegas, Nevada. Las Vegas is within the City Grade contour of the proposed Paradise station. Mr. Roller is a 25% general and limited partner in LV Cm, Ltd., and Mr. Goff is a 25% limited partner in LV Cm, Ltd. The respective interests could raise multiple ownership/cross interest issues (the applicants have not submitted the appropriate certification supporting insulation of the limited partnership interests). However, both Charles Roller and David Goff have pledged to divest their interests in the FM application if Puamehana, Ltd., is the successful applicant in this proceeding. Accordingly, a grant of a construction permit to Puamehana, Ltd., will be appropriately conditioned.

4. Nevada 39, Inc. (Nevada), in its original application, indicated that financial certification would be forthcoming. In an amendment filed on July 16, 1986, Nevada further indicated "that the applicant has the financial strength and resources to secure the requisite bank letter and equipment letter of credit and that written documentation in support of financial certification is in process." As of this date Nevada has not completed its financial certification. Accordingly, Nevada will be given 20 days from the release date of this Order to review its financial proposal in light of Commission requirements, to make any changes that may be necessary and, if appropriate, to submit a certification to the presiding Administrative Law Judge in the manner called for in Section III, FCC Form 301, as to financial qualification. If Nevada cannot make the required certification, it shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

5. Sonia Maxwell is the sole general partner with a 20% equity interest in Nevada Broadcasting Group, an applicant in this proceeding. She is also currently employed by WTMJ, Inc. the licensee of Station KTNV-TV, Las Vegas, Nevada. Las Vegas is within the City grade contour of the proposed Paradise station. Since, Ms. Maxwell has not disclosed in what capacity she is employed by KTNV-TV, this relationship may raise a cross-interest question. Accordingly, an appropriate issue will be specified.

6. No determination has been reached that the tower height and location proposed by Wynn Communications and Puamehana, Ltd. each would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

7. The effective radiated visual power, antenna height above average terrain and other technical data submitted by the applicants indicate that there is a substantial difference in the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Nevada Broadcasting Group, whether Sonia Maxwell's employment by station KTNV(TV), Las Vegas, Nevada is consistent with the Commission's cross-interest policy and, if not, whether grant of the application would be consistent with the public interest.

2. To determine, with respect to Wynn Communications, Inc. and Puamenhana, Ltd., whether there is a reasonable possibility that the tower height and location proposed by each would constitute hazard to air navigation.
3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

10. IT IS FURTHER ORDERED, That Pollack Broadcasting Co. shall submit, as an amendment, a completed page 19, FCC Form 301, to the presiding Administrative Law Judge, within 20 days after this Order is released.

11. IT IS FURTHER ORDERED, That, in the event that Puamehana Ltd., is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Charles Roller and David Goff have severed all interest in and connection with LV Cm, Ltd., an applicant for an FM radio station in Las Vegas, Nevada.

12. IT IS FURTHER ORDERED, That Nevada 39, Inc. shall submit a financial certification in the form required by Section III, FCC Form 301, or advise the presiding Administrative Law Judge that the certification cannot be made, as may be appropriate, within 20 days after this Order is released.

13. IT IS FURTHER ORDERED, That the amendment filed July 22, 1986, by Wynn Communications IS ACCEPTED *nunc pro tunc*. 14 . IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

15. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] Wynn Communications, Inc. filed an amendment to its application on July 16, 1986, (the "B cut-off date) with a facsimile signature. An original signature page was submitted on July 22, 1986. In view of the fact that all parties were put on timely notice concerning the contents of the amendment, none were prejudiced. The amendment was timely filed; only the original signature was missing. These circumstances are governed by a long-standing Commission policy which dictates that the amendment and signature be accepted *nunc pro tunc*. *Communications Gaithersburg, Inc.*, 60 FCC 2d 537 (1976); *B. J. Hart*, 44 FCC 2088 (1960). Accordingly, the signature page will be accepted *nunc pro tunc*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY	AAD 6-1518
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	AAD 6-1516
and	
NEW JERSEY BELL TELEPHONE COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, AND THE DIAMOND STATE TELEPHONE COMPANY	AAD 6-1523

Waiver of Section 64.702 of the Commission's Rules to Offer Service Maintenance Plans

MEMORANDUM OPINION AND ORDER

Adopted October 2, 1986; Released October 10, 1986

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. By Petitions filed August 28, September 2 and September 10, 1986, respectively, Southwestern Bell Telephone Company (Southwestern Bell), New England Telephone and Telegraph Company (NET), and New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania and The Diamond State Telephone Company (NJB, BPa. and DST) request waivers of Section 64.702 of the Commission's rules (the *Computer II* rules) so that they may, as an option to their service maintenance plans, loan to residential and single line business customers a telephone set which is owned by an unaffiliated customer premises equipment (CPE) vendor. The "loaner" feature would allow petitioners' customers to obtain emergency continuation of service when service problems arise from defective CPE and not from telephone plant or inside wiring. For the reasons set forth below, we conclude that the public interest considerations set forth in the *C&P Loaner Set Order*[1] are applicable to these requests, and we accordingly grant the petitions.

II. THE PROPOSALS

2. *Southwestern Bell.* Southwestern Bell's proposed "loaner" feature is an adjunct to its service maintenance plan under which customers would pay a monthly fee for the "loaner" feature in addition to the fee for maintenance of their inside wiring. Southwestern Bell proposes to contract with an unaffiliated CPE vendor who will own the CPE and bear the risk and responsibility for damage to the telephone set and for failure of the customer to return the set. Southwestern Bell anticipates that it will pay the vendor an initial charge per set, a restocking fee and a small monthly administrative handling fee per set. Southwestern Bell also states that its ". . .service representatives will be instructed not to interfere with the relationship between customers and their CPE suppliers" and will ". . . supply a loaner set to the customer without disparaging the customer's existing CPE or encouraging the purchase or lease of any particular vendor's CPE." Southwestern Bell asserts that its loaner set proposal is "virtually identical" to the proposal described in the *C & P Loaner Set Order, supra.*

3. *NET.* NET likewise proposes to offer the "loaner" feature as an optional extension of its wiring maintenance plans. The NET proposal is essentially identical to Southwestern Bell's proposal, with two exceptions. First, NET specifically agrees to abide by the conditions contained in paragraphs 9 and 14 of the *C&P Loaner Set Order, supra.* Second, rather than immediate effectiveness on a tariffed basis, NET proposes not to offer its "loaner" feature until January 1, 1987, at which time it will be offered on a detariffed basis consistent with the Commission's *Second Report and Order* in CC Docket No. 79-105.[2]

4. *NJB, BPa. and DST.* The NJB, BPa. and DST proposal is essentially identical to the NET proposal, except for the proposed effective date. NJB, BPa. and DST, like NET, specifically agree to abide by the same conditions contained in the *C&P Loaner Set Order, supra.* However, unlike NET, NJB, BPa. and DST propose to immediately offer the "loaner" feature as an optional extension to their existing tariffed wiring maintenance plans.

III. DISCUSSION

5. Initially, we find that the Southwestern Bell, NET and NJB, BPa. and DST proposals are virtually identical to the waiver request granted in the *C&P Loaner Set Order, supra.* Since NET and NJB, BPa. and DST have agreed to abide by the same conditions as C&P, their proposals are, indeed, identical. While not agreeing to abide by the specific C&P conditions, Southwestern Bell's proposal satisfactorily addresses the concerns that we have expressed in the granting of two additional "loaner" waiver requests following public notice and comment.[3] Accordingly, we have not sought public comment upon the Southwestern Bell, NET and NJB, BPa. and DST waiver requests. *See C&P Loaner Set Order, supra,* at footnote 17.

6. We find that all three loaner set waiver requests should be granted. All of these proposals will offer a convenience to customers who are willing to pay a fee to ensure that one visit will result in the immediate restoration of telephone service. In addition, all three proposals incorporate the essential features of the loaner proposals that we have previously approved. For the reasons set forth in those decisions, we find that grant of the waivers herein is not inconsistent with the policy considerations underlying the Computer II decision.[4] Finally, we find that NET's proposal to implement its "loaner" feature on a detariffed basis is not inconsistent with the public interest considerations which led us to grant C&P's waiver request. That decision correctly reflects the obligation of all local exchange telephone companies to detariff the installation and maintenance of inside wiring effective January 1, 1987. *See Second Report and Order, supra.*

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, that the Petitions of Southwestern Bell Telephone Company, New England Telephone and Telegraph Company, and New Jersey Bell Telephone Company, the Bell Telephone Company of Pennsylvania, and The Diamond State Telephone Company for waiver of Section 64.702 of the Commission's rules to loan, on a nonseparated basis, telephone sets to residential and single line business customers as an option to their service maintenance plans ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See Memorandum Opinion and Order*, The Chesapeake and Potomac Telephone Companies, Waiver of Section 64.702 of the Commission's Rules and Regulations to Offer a Service Maintenance Plan, AAD 6-1374, Mimeo No. 4164 (released May 2, 1986) (*C&PLoaner Set Order*).

[2] Detariffing the Installation and Maintenance of Inside Wiring, FCC 86-63 (released February 24, 1986), recon. pending (*Second Report and Order*).

[3] *See Memorandum Opinion and Order*, The Ameritech Operating Companies, Waiver of Section 64.702 of the Commission's Rules to Offer a Service Maintenance Plan, AAD 6-1409, Mimeo No. 4813 (released May 30, 1986) and *Memorandum Opinion and Order*, The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, Waiver of Section 64.702 of the Commission's Rules to Offer Service Maintenance Plans, AAD 6-1471, Mimeo No. 6209 (released August 8, 1986).

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980), *reconsideration* 84 FCC 2d 50 (1980), *further reconsideration* 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. F.C.C.*, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983), *second further reconsideration* FCC 84-190 (released May 4, 1984). *The Computer II rules are applicable to the BOCs, with modifications. Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services, and Cellular Communications Services by the Bell Operating Companies*, 95 FCC 2d 1117 (1984) *(BOC Separation Order), reconsideration* FCC 84-252 (released June 1, 1984), *aff'dsubnom. Illinois Bell Telephone Co. v. F.C.C.*, 740 F. 2d 465 (7th Cir. 1984), *decision on reconsideration aff'd sub nom. North American Telecommunications Ass'n v. F.C.C.*, 772 F.2d 1282 (7th Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEPORT INTERNATIONAL LTD. AND AMERICAN SATELLITE COMPANY

File No. I-T-C-86-115

For a certificate pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's rules and regulations to establish and operate two way non-switched satellite business communications services between points in the United States and Montego Bay in Jamaica

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 9, 1986 **Released: October 9, 1986**

By the Commission:

1. The Commission has under consideration a joint application filed by Teleport International Ltd. (TI) and American Satellite Company (ASC) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to extend lines of communication via satellite facilities for the provision of non-switched private line business communications between points in the contiguous United States and Jamaica.

2. The application was placed on the Commission's public notice on June 11, 1986. Communications Satellite Corporation (Comsat) filed a petition to deny the application. Comments were filed by the National Telecommunications and Information Administration (NTIA), American Telephone and Telegraph Company (AT&T) and Jamaica National Investment Promotion Limited (JNIP). TI/ASC filed reply comments to which Comsat responded.

I. Application

3. Under this proposal TI will acquire domestic satellite capacity from ASC to provide two-way high speed data, voice, video and business services via private lines between the offices or other facilities of U.S. firms and a teleport facility located in Montego Bay, Jamaica. The specific service applications would include data entry, telemarketing and reservation services. The primary attraction of providing these services is economic. The TI/ASC proposal relies heavily on cost saving resulting from the utilization of skilled workers in Jamaica who will work for lower wages than their U.S. counterparts. The facilities provided to TI by ASC will be utilized to provide channels of communications between existing ASC owned and operated earth station facilities in or near New York, New York; Atlanta, Georgia; Miami, Florida; Phoenix, Arizona; Chicago, Illinois; San Francisco, California; Los Angeles, California and other points in the United States and a new earth station to be constructed in Montego Bay, Jamaica. These channels of communications will be provided through transponder capacity on WESTAR IV, ASC-1 or other domestic satellites on which ASC has transponders available.

4. Initially, TI proposes to lease 400 standard voice grade circuits: 200 each between New York, New York and Atlanta, Georgia and the TI facility in Jamaica. Termination in the United States will be via existing shared access earth stations in the vicinity of those cities. TI states that users in the United States shall be responsible for the termination of their own private lines of communications at these U.S. termination points, presumably through leases with existing U.S. common carriers. In Jamaica, these circuits will terminate in an ASC owned and operated satellite earth station. TI will provide interconnection between this facility and users premises within TI's authorized zone of operations in Jamaica pursuant to a license from the Government of Jamaica (GOJ).

5. TI/ASC state that their extensive exploration of the market opportunities in the information industries sector of North America indicates that there is a significant and increasing demand for telecommunications-based business services, such as remote data entry, electronic transcription services, electronic document distribution, video teleconferencing, specialized non-switched voice services, and database upkeep, manipulation, and maintenance. However, TI/ASC assert that the present high cost of traditional international telecommunications services presents a barrier to the development of innovative telecommunications-intensive service and information industries in nearby nations of the Caribbean and Central America and to the integration of these services into the growing North American information sector. TI/ASC believe that the nearby nations of the Caribbean, particularly those such as Jamaica which share our traditions of government and language, provide an untapped resource for such services. TI/ASC expect their proposal to: 1) strengthen the shared heritage and economic interests of the region; 2) create hundreds, and eventually thousands of information services sector jobs in Jamaica, thus serving the purposes of the U.S. government's Caribbean Basin Initiative and its overall interests in the economic prosperity and political stability of the region; 3) make available to U.S. industry and the U.S. public lower cost, more innovative information services; and 4) result in an economic advantage to U.S. industry in the information services market by increasing the export of U.S. goods and services. TI/ASC assert that no telecommunications services are available on the same magnitude as they propose or in an economically feasible format which would support the development of specialized offshore information industries. Specifically, TI notes that INTELSAT Business Service (IBS) does not fully meet the business service needs as set forth in its application.

6. TI/ASC maintain that their application is consistent with the Commission's Transborder policy since use of the INTELSAT system would increase the cost of its proposed service to the point that it would become economically unattractive. TI/ASC cite the Commission's authorization of specialized service to Canada as precedent for its proposal. With respect to alternative facilities to provide the proposed service, TI/ASC note that the INTELSAT Atlantic Ocean Region (AOR) satellite is not located to serve the needs of customers in the western United States. Absent the launch of a new satellite, TI/ASC maintain that similar problems exist in reaching potential business users in Montego Bay locations.

7. TI/ASC state that the proposed service will not harm the INTELSAT system because the traffic is not now carried by INTELSAT and has not been included in INTELSAT's traffic forecasts. TI believes that its project will increase traffic over the global system, since the resulting economic success and multinational involvement will increase the demand for public switched telecommunications services. TI/ASC also contend that no Article XIV(d) consultation is necessary or that such consultation should be limited given the current U.S.-Latin America/Caribbean consultation which permits one-way data service.

II. The Pleadings

8. The comments filed in response to the TI/ASC application focus on whether the proposal is consistent with U.S. Transborder policy and/or Separate Systems policy. U.S. Transborder policy was developed in response to requests to use domestic satellites for certain international telecommunications services to points within their coverage areas. The policy is based on a letter to the Commission from the Department of State setting forth the criteria by which the Commission may authorize transborder communications consistent with U.S. obligations under the INTELSAT Agreement.[1] Under U.S. policy, domestic satellites may be used for public international telecommunications where: 1) the global system could not provide the service required; or 2) where the service planned would be clearly uneconomical or impractical using the INTELSAT system. U.S. Separate Systems policy was developed as a result of applications filed with the Commission proposing to construct and operate international satellite systems separate from INTELSAT. The policy is based on the imposition of certain service[2] restrictions developed by the Executive branch and adopted by the Commission[3] to assure the continued economic viability of INTELSAT. Under U.S. policy, separate satellite systems are restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public switched networks. Under both the Transborder and Separate System policies the Commission has adopted specific procedures to assure that U.S. obligations under Article XIV(d) of the INTELSAT Agreement are fulfilled prior to initiation of service.[4]

9. In its petition to deny, Comsat asserts that the TI/ASC application is inconsistent with U.S Transborder policy. Comsat notes typical transborder applications have involved service incidental to domestic service. In contrast, Comsat views the TI/ASC application as proposing a dedicated international service with no domestic component whatever. Further, Comsat argues that to permit two-way communications between U.S. and Caribbean points would be a major departure from Commission policy. In this regard, Comsat points out that the Commission has previously approved two-way transborder services for U.S.-Canada and U.S.-Mexico traffic only. Comsat notes that these countries share contiguous borders with the U.S. and their communications systems have been substantially integrated with that of the U.S. Moreover, Comsat notes that in the case of Canada, the INTELSAT system has never been used for traffic to and from the U.S. Comsat maintains that the same is not true for Caribbean nations, including Jamaica, which have relied on INTELSAT to carry a substantial portion of their U.S. traffic.

10. Comsat asserts that the proposed service could be provided by INTELSAT. Comsat views INTELSAT's IBS service as an ideal alternative to providing the non-switched private line service proposed by TI/ASC. Comsat also takes exception to TI/ASC's statement that INTELSAT's AOR facility is not appropriately located to serve the need of customers in the western U.S. Noting that the TI/ASC service will initially provide service from New York and Atlanta, Comsat argues that the Commission has authorized many IBS facilities in the eastern United States. On the issue of pricing, Comsat contends that the cost of IBS would be competitive with anything the applicants could offer. Comsat asserts that it offers IBS space segment to any international carrier at $780 per month for a 64 Kbps half circuit.

11. Comsat also views the application as inconsistent with U.S. Separate Systems policy. Since diagrams attached to the application contemplate interconnection with the public switched network, Comsat believes the application cannot be granted in light of the prohibition against interconnection with the public switched network.

12. Finally, Comsat argues that if the proposed service is authorized, a new Article XIV(d) process would be required. Comsat notes that current Article XIV(d) consultation for the Caribbean involves only one-way service received incidental to the primary U.S. domestic transmissions and that the ASC-1 satellite is not consulted for U.S.-Jamaica service.

13. AT&T also notes that certain aspects of the application appear to involve interconnection with the public switched network. AT&T believes that the interconnection issue should be clarified in view of the prohibition contained in the Separate Systems policy against such interconnection.

14. NTIA supports a grant of the TI/ASC application. NTIA views the TI/ASC application as vital to the Caribbean region's economic development and in furtherance of the administration's Caribbean Basin Initiative. NTIA notes that a Department of Commerce study on the Jamaican telecommunications infrastructure identified a teleport as one of eleven projects designed to remove telecommunication related impediments to the expansion of investment, production and trade. NTIA states that the teleport is extremely important to Jamaica's national economic development program since the teleport is expected to attract foreign investment, create new employment opportunities and generate much needed foreign exchange. NTIA believes that the proposed system falls under the U.S. Separate Systems guidelines. NTIA notes that since the application proposes use of private lines not interconnected with the public switched network it is consistent with Executive Branch policy. In addition, NTIA states that the services must also be offered under a long-term lease as defined in the Commission's *Separate Systems* decision.

15. JNIP, the economic development agency of the Government of Jamaica (GOJ), filed comments in support of the application. JNIP notes that the GOJ commenced discussions on the proposed project with TI only after deciding that it was not feasible for Jamaica International Telecommunication (JAMINTEL), Jamaica's signatory to the INTELSAT Agreement, to undertake the project. JNIP views the project as very important to the GOJ since it would generate thousands of jobs for Jamaicans and provide much needed government revenue. According to JNIP, the project would also be beneficial to U.S. companies by providing lower cost transparent telecommunications at similar or higher quality and at lower costs than currently available.

16. In addition, JNIP sees no potential harm to INTELSAT. JNIP argues that the proposed service will not divert any traffic which is now or which has ever been provided over the INTELSAT system. JNIP notes that the service will take traffic currently and previously provided in the U.S. over domestic facilities and send it to Jamaica. With respect to interconnection to the public switched network, JNIP states that the GOJ has required TI to establish a local area network which does not interconnect with the public switched network. Customers using the teleport would be required to transmit other communications over JAMINTEL/Jamaica Telephone Company Limited lines where such communications are required within Jamaica. Where normal international connections would be required, companies which would not have established operations in Jamaica but for the teleport, would be required to use the INTELSAT system via JAMINTEL. Thus, instead of causing harm to INTELSAT, JNIP believes the project will actually promote economic enhancement to the INTELSAT system.

III. Discussion

17. The application before us raises specific questions as to its consistency with U.S. Transborder and Separate Systems policies. However, the application also involves broader concerns with respect to the need for economic development in Jamaica and the Caribbean area and the role to be played by the U.S. in assisting such development. Thus, there are significant national and foreign policy considerations which weigh in favor of the proposal. The proposal has the endorsement of the Executive Branch (NTIA is the Executive Branch agency principally responsible for development of international and domestic telecommunications and information policy) as well as the Government of Jamaica. As stated by JNIP and NTIA, the teleport proposal is of vital importance to both the U.S. and Jamaican governments. The proposal is beneficial to Jamaica because it will create thousands of jobs, raise money for the economy and provide badly needed foreign exchange. The Government of Jamaica has decided that these ends are best accomplished through the use of U.S. domestic satellites rather than the INTELSAT system. From a U.S. standpoint, the proposal accomplishes one of the objectives of the Caribbean Basin Initiative by creating new investment in Jamaica. In addition, as part of its continuing study on the telecommunications infrastructures in the Caribbean, the Department of Commerce has identified a teleport in Jamaica as one of eleven projects necessary to attract new investment and improve Jamaican telecommunications in the process.[5]

18. Comsat opposes the application based on a narrow reading of the Commission's Transborder and Separate Systems policies. First, Comsat argues that the application is inconsistent with Transborder policy because it proposes dedicated international service with no domestic component. Comsat argues that to permit such two-way service between the U.S. and the Caribbean would be a marked departure from Commission policy. Second, Comsat views the proposal as inconsistent with Separate Systems policy because it involves interconnection with the public switched network. Comsat asserts that INTELSAT can provide the proposed service through its IBS offering. Finally, Comsat argues if the proposed service is authorized, it will require a new INTELSAT Article XIV(d) consultation.

19. We disagree with Comsat that the TI/ASC is inconsistent with U.S. Transborder policy. Under this policy, we have granted well over one hundred applications.[6] In considering these applications to extend video services to transborder points, we determined that while INTELSAT facilities were capable of providing the services in some instances, it would be uneconomical and impractical for U.S. programmers/distributors to use the global system for the proposed transborder services. That finding was based on the fact that the services sought to be extended were already being transmitted over domestic satellites whose "footprints" included nearby countries and the extension of that programming to small, low-cost, receive-only earth stations in those countries would involve no significant additional costs. We found that the alternative method of using INTELSAT facilities would involve significant additional costs due to the multi-satellite hops and additional terrestrial facilities that would be required. In addition, we found that the use of the INTELSAT system to duplicate programming already available on domestic satellites would be an inefficient use of the available radio spectrum.

20. We have made similar findings with respect to business services.[7] Moreover, we noted that the global system has not been used for traffic between the U.S. and Canada. Although the U.S. INTELSAT earth stations at Etam, West Virginia and Andover, Maine could transmit and receive traffic over the AOR satellite, we found that service via INTELSAT would be uneconomical and impractical since it would involve 1) higher costs necessary to duplicate networks already in place; 2) higher costs and inefficiency associated with multi-satellite hops and terrestrial links which would be required to extend transmission to a customer's premises; and 3) an inefficient use of the available radio spectrum. Moreover, the Commission noted that the coverage of the AOR satellite footprint did not include the central United States or central, northern or western provinces of Canada.

21. To date, the Article XIV(d) consultations have been completed for U.S.-Canada, U.S.-Mexico and U.S.-Latin America/Caribbean transborder services. The Article XIV(d) consultations for U.S.-Canada and U.S.-Mexico include full-time and occasional video, audio, data and business services that can originate in either country. The U.S.-Latin America/Caribbean consultation, which includes Jamaica, only involves one-way, receive-only video, audio and data services which can be received as a by-product of a primary U.S. domestic transmission. A complete summary of countries, services and satellites consulted under Article XIV(d) is appended hereto.

22. The services proposed by TI/ASC are not radically different from transborder services authorized for Canada and Mexico. Both services involve use of a domestic satellite for private-line communications for the provision of specialized two-way data communications. Comsat argues that transborder services must be incidental in nature, i.e., received as part of domestic transmission. Our experience with Canada and Mexico clearly refutes this contention. The business services consulted for Canada and Mexico contemplate the provision of specialized services. Moreover, specialized video services are permitted which are unrelated to any domestic component. Thus, the fact that specialized international transmissions are contemplated does not remove TI/ASC's application from the realm of our Transborder policy.

23. Comsat also argues that two-way, specialized communications between the U.S. and any non-contiguous location would be inconsistent with the Transborder policy. We disagree. Nowhere among our transborder decisions has any geographic restriction been imposed for points which naturally fall within the footprint of U.S. domestic satellites. The same rationale exists with respect to the use of business services here as with service to Canada and Mexico. The fact that these services have traditionally been provided over well integrated terrestrial facilities is not directly germane to the question of whether these services meet our Transborder criteria. As noted previously, our criteria are whether: 1) INTELSAT can provide the service; or 2) it would be uneconomical or impractical to use the INTELSAT system. The fact that service between the U.S. and Mexico and Canada has traditionally been provided via terrestrial networks, however, does go to the issue of economic harm to INTELSAT. Although we consider this potential, the issue of economic harm will come under closer scutiny in the INTELSAT Article XIV(d) consultation process. Moreover, the fact that currently only one-way services have been authorized by the Commission for service to Caribbean locations is not evidence of a geographic limitation on the scope of transborder services. No two-way service between the U.S. and Caribbean locations has ever been considered by the Commission. Nor does the Buckley letter impose such a limitation as suggested by Comsat. Rather, the Buckley letter sets forth general criteria to be applied in acting on all applications for use of domestic satellites for service to locations within their footprints.

24. Applying the criteria of the Buckley letter to the instant application we find that the service proposed by TI/ASC could be provided over the INTELSAT system. INTELSAT's IBS offering would appear to offer the same capability as is available via domestic satellite. TI/ASC claims that the INTELSAT AOR satellite at 307 provides a look angle which is 7 beyond the limit of what is normally considered the eastern extreme of the domestic arc. As a result, TI contends that more sophisticated earth station equipment would have to be added in comparison with domestic earth stations in order to serve its western U.S. service points. On the other hand, Comsat states the look angles from New York, Atlanta and Jamaica are 37 , 37 and 54 , respectively, which would be sufficient for the proposed service. TI/ASC's argument as to the look angles provided by the INTELSAT 307 IBS satellite is based on service from all points involved in its proposal, including the western U.S. locations. Comsat focuses on the initial service points of New York, Atlanta and Jamaica, from which a satisfactory look angle is provided. We do not believe that this argument is dispositive on the issue of technical ability of INTELSAT to provide the proposed service. Although an optimum look angle may not be available to the western U.S. locations without the addition of sophisticated equipment, we note that such considerations go to the economic feasibility of using the INTELSAT system.

25. Although the proposed services could be provided via INTELSAT, we find that it would be clearly uneconomical and impractical to use the INTELSAT system within the meaning of the criteria in the Buckley letter. Accepting Comsat's estimated monthly cost of $780.00 per IBS half circuit, and assuming a similar rate for the Jamaican end,[6] use of the INTELSAT system would at the very least involve a monthly charge of $1560 or over two and one-half times greater than the monthly per circuit charge of $575 cited by the applicants. Although TI/ASC's initial projection is for 400 voice-grade circuits from all locations, we note that the initial thrust of the service will involve 200 voice-grade circuits between Atlanta and New York on the one hand and Jamaica on the other hand. Based on a conservative estimate involving only the initially projected 200 circuits per month for east coast traffic, TI/ASC would realize savings of $197,000 per month. Acceptance of ASC's 400 circuit estimate from other locations would double these cost savings. Given this significant disparity in circuit costs, we find that use of the INTELSAT system would be clearly uneconomical. Moreover, since the driving force behind the application is the low cost of labor in Jamaica which becomes less attractive as communications costs rise, it is clear that use of the INTELSAT system would significantly raise the cost of service to the point of being prohibitive. Thus, use of INTELSAT would be clearly uneconomical. We note that the Government of Jamaica and the applicants are not precluded from using IBS should they choose to do so. Indeed, given the economic factors involved, it appears that the applicants would elect to use the least costly mode of operation. In addition, it appears that the applicants are considering the feasibility of this proposal in the context of a total system and not just space segment facilities. We believe that the alternative of using different carriers' IBS facilities or use of ASC's Washington, D.C. IBS facility as a gateway hub would be clearly uneconomical and impractical. Use of ASC's Washington, D.C. IBS facility as a gateway hub would involve significant use of terrestrial facilities and/or double hops. Moreover, use of the National Network would involve facilities already in place, whereas IBS earth stations are not currently authorized for every western U.S. location involved in the TI/ASC proposal. Thus, to serve those locations via the INTELSAT system would require the use of terrestrial facilities or the use of a domestic satellite hop. In view of these factors, we find that use of the INTELSAT system would be clearly uneconomical and impractical.

26. Although TI/ASC classify their service a two-way private line service, it appears that customer access to the system is possible, if not probable, through the U.S. public switched network. Thus, in viewing the application as one for a separate international system, Comsat argues that it cannot be granted in light of the prohibition contained in the *Separate Systems* decision against any interconnection with the public switched network. We do not believe that this application should be categorized under the U.S. Separate Systems policy. Initially, we observe that the *Separate Systems* decisions was not intended to change Transborder policy in any way. In addition, the services proposed are clearly distinguishable from separate systems applications in several aspects. The satellite involved here is and has always been designed for domestic uses and not to compete with the global system. The Commission's *Separate System* decision dealt with the construction of international satellites as an alternative to INTELSAT. Here we have before us a request to use a domestic satellite for a specialized international service to a location within the natural coverage area or footprint of the satellite. This case is distinguishable from RCA Americom's request to use domestic satellite capacity for international service to Europe. There, RCA Americom proposed to redesign its satellite to permit international communications. No such modifications would be required to provide the proposed service.

27. In viewing the application as a transborder service, the prohibition against interconnection with the public switched network is not directly applicable under the terms of the Buckley letter. More important, however, the prohibition is unnecessary here. The prohibition was designed to avoid economic harm to the global system from separate satellite systems which would compete with INTELSAT for customized services. We do not envision any economic harm to INTELSAT resulting from the proposed service. Jamaica is attempting to develop a new industry by fulfilling the communications needs of U.S. firms which currently use U.S. domestic systems to satisfy those needs. Thus, the services to be provided by TI/ASC between the U.S. and Jamaica are historically domestic in nature that will become newly generated international traffic. They are not now provided via INTELSAT and have never been part of the INTELSAT revenue base. Therefore, the extension of these services to Jamaica will not result in economic harm to INTELSAT even though the services could be provided over the INTELSAT system. In this regard, Comsat's assertion that U.S.-Jamaica service has been provided via INTELSAT is inapposite to the particular facts of this case. None of the U.S.-Jamaica traffic provided by INTELSAT will be affected by the TI/ASC proposal. Indeed, the increased foreign investment in Jamaica resulting from the TI/ASC proposal could create additional international traffic via the global system. On this point, JNIP states that TI has been required to establish a local area network not interconnected with the public switched network and that any communications not connected with the teleport's operation would have to be routed via regular domestic and international circuits.

28. Notwithstanding the fact that the traffic involved in the TI/ASC proposal will be newly generated, we note that the number of 4 kHz data circuits projected for U.S.-Jamaica service is extremely small. According to INTELSAT traffic data, only seven data circuits were in operation in 1985 and by 1999 only twenty-seven circuits are projected for U.S.-Jamaica service.[9] Thus, even if the TI/ASC proposal involved traffic expected to be carried over the INTELSAT system, the resulting impact would be small.

29. Having determined that the application is consistent with U.S. policy and in view of the broader goals achieved by the proposal, we conclude the grant of the application is in the public interest. The TI/ASC proposal would lower the cost of providing data entry, reservation and telemarketing services to U.S. companies. These cost savings would, in turn, result in lower prices to American consumers. We will conditionally grant the application subject to the following conditions: 1) completion of the INTELSAT Article XIV(d) consultation process: 2) the issuance of a final order by the Commission authorizing the implementation of service.

30. TI/ASC's contention that consultation under Article XIV(d) may not be necessary or that any such consultation should be limited in scope is without merit. The proposed two-way service is clearly outside the scope of the existing consultation governing U.S.-Jamaica transborder service. At present, the services consulted for Jamaica are one-way video, audio and data services which are currently distributed throughout the U.S. via domestic satellites and which are capable of being received in Caribbean locations with the addition of small, low-cost, receive-only earth stations. Because the services proposed are two-way specialized services, we see no relationship between them and the one-way services previously consulted. Thus, the TI/ASC proposal will require a new Article XIV(d) consultation.

31. Accordingly, IT IS ORDERED, that the application of Teleport International and American Satellite Company, File No. I-T-C-86-115. IS GRANTED subject to the following conditions: The authorization may not be implemented until: (a) INTELSAT Article XIV(d) consultation process is completed; and (b) the Chief, Common Carrier Bureau issues an order authorizing the implementation of service.

32. The Commission retains jurisdiction over this application to take such further action as may be necessary to implement or modify its decision here.

33. The Commission delegates authority to the Chief, Common Carrier Bureau to issue an order authorizing the implementation of service once the stated conditions are fulfilled.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Letter from UnderSecretary of State James L. Buckley, Department of State to Chairman Mark Fowler, Federal Communications Commission, dated July 23, 1981.

[2] Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to Mark S. Fowler, Chairman, Federal Communications Commission (November 28, 1984).

[3] Establishment of Satellite Systems Providing International Communications (Separate Systems decision) 101 FCC 2d 1046 (1985) *reconsideration*, FCC-86-144, (released April 17, 1986).

[4] Article XIV(d) requires that any use of non-INTELSAT space segment facilities for international public telecommunicationsservices be consulted with INTELSAT to ensure the technical compatibility of the facilities and to avoid significant economic harm to the global system.

[5] We are aware that the TI/ASC proposal may result in a shift of jobs from the U.S. to Jamaica. While we are obviously concerned about this aspect of the proposal, a number of factors must be balanced. For instance, as noted above, the proposal would also lower operating costs for American companies and, in turn, lower prices for American consumers. On balance, the Executive Branch supports the proposal. Because of these and other considerations, we believe that the proposal is in the public interest.

[6] Transborder Satellite Video Services, 88 FCC 2d 258 (1981) (Transborder I); Eastern Microwave, Inc., I-P-C-81-049 *et al.*, Mimeo No. 2617, released March 1, 1983 (Transborder II); American Telephone and Telegraph Company, File Nos. I-P-C-82-048 *et al.*, Mimeo No. 6119, released August 26, 1983 (Transborder III); Bonneville Satellite Corp., *et al.*, File Nos. I-T-C-83-148 *et al.*, Mimeo No. 1554, released December 29, 1983 (Transborder IV); Western Union Telegraph Co., *et al.*, File Nos. I-T-C-83-068, *et al.*, Mimeo No. 3286, released April 4, 1984 (Transborder V); Eastern Microwave, Inc., *et al.*, File Nos. I-T-C-84-095 *et al.*, Mimeo No. 6425, released September 11, 1984 (Transborder VI); Western Union Telegraph Co., *et al.*, File Nos. I-T-C-83-136, *et al.*, Mimeo No. 3643, released April 8, 1985 (Transborder VII); American Satellite Company, *et al.*, File Nos.

I-T-C-85-187 *et al.*, Mimeo No. 7299, released September 30, 1985 (Transborder VIII); RCA American Communications, Inc., *et al.*, File Nos. I-T-C-86-002 *et al.*, Mimeo No. 2578, released February 14, 1986 (Transborder IX); Hughes Galaxy, Inc., File No. I-T-C-83-101, Mimeo No. 2472, released February 11, 1985; Satellite Signals Unlimited, Inc., *et al., File Nos. I-T-C-81-069 et al.*, Mimeo No. 3519, released March 29, 1985; RCA American Communications, Inc., *et al.*, File Nos. I-P-C-81-038 *et al.*, Mimeo No. 3294, released May 6, 1985; and National Cable and Satellite Corp., *et al* ., File Nos. 417-DSE-ML-86 *et a l.*, Mimeo No. 5220, released June 20, 1986 (Transborder X).

[7] Business services include data and electronic document distribution, video teleconferencing and private line voice communications. See American Satellite Co., 88 FCC 2d 178 (1981) and Satellite Business Systems, 88 FCC 2d 195 (1981).

[8] Since IBS is not currently provided to Jamaica, we do not have a corresponding half circuit cost for the Jamaican end of IBS service. We note, however, that INTELSAT has developed a new service, CARIBNET, which is expected to result in lower rates for service to the Caribbean Region. Whether CARIBNET is economically and technically substitutable for the TI/ASC service proposal has not been considered since Comsat has not yet sought authorization for the service or filed a tariff.

[9] 1985 INTELSAT Traffic Database.

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